92-771

Supreme Court, U.S.
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No._____

In the Supreme Court of the United States

OCTOBER TERM, 1992

EUGENE HASENFUS and KASANEE SAWYER,
Petitioners,

v.

RICHARD SECORD and SOUTHERN AIR TRANSPORT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the due process rights of Petitioners, whose plane crashed while on a daytime Iran/Contra resupply flight in Nicaragua after being hit by a hand-held missile, were violated when a directed verdict was entered and affirmed despite substantial evidence that respondents negligently precluded safer night flights.

2. Whether the due process rights of Petitioner Eugene Hasenfus were violated when the Court of Appeals affirmed a holding that his contract with the resupply operation was terminated the day his plane was shot down instead of by the terms of the contract.

LIST OF PARTIES

The parties to the proceedings below were the petitioners Eugene Hasenfus and Kasanee Sawyer and the respondents Richard Secord and Southern Air Transport. Three other parties named in the complaints, plaintiff Sally Hasenfus and defendants Corporate Air Services and Albert Hakim, are not involved in this petition for certiorari.

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Respondents.

PETITION FOR WRIT OF CERTIORARI

The Petitioners, Eugene Hasenfus, Sally Hasenfus, and Kasanee Sawyer, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on June 15, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 962 F.2d 1556, and is reprinted in the appendix hereto, p. __, *infra*. The Eleventh Circuit's denial of a timely petition for rehearing is reprinted in the appendix hereto, p. __, *infra*. The opinion of the United States District Court for the Southern District of Florida in granting, in part, respondents' motion for directed verdict

is unreported but reprinted in the appendix hereto, p. __, *infra*.

JURISDICTION

The jurisdiction of the Southern District of Florida was invoked under 28 U.S.C. § 1332, plaintiffs Eugene and Sally Hasenfus being citizens of Wisconsin, plaintiff Kasanee Sawyer being a citizen of Arkansas, defendant Richard Secord being a citizen of Virginia, defendant Southern Air Transport being a citizen of Florida, defendant Corporate Air Services being a citizen of Pennsylvania, and defendant Albert Hakim being a citizen of California. The amount in controversy exceeded $50,000 in each of the consolidated cases. After a jury trial, judgment was entered for respondents.

On June 15, 1992, the Eleventh Circuit entered a judgment and an opinion affirming the Southern District's orders. *See* 956 F.2d 1556 (11th Cir. 1992). The petitioners then filed a timely petition for rehearing, pursuant to Rule 40 of the Federal Rules of Civil Procedure. On July 24, 1992, the Eleventh Circuit denied the petition without explanation. *See* p. __, *infra*.

The jurisdiction of this Court to review the judgment of the Second Circuit is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case arises out of a covert attempt by a joint venture to supply arms and other materials to Contra forces in Nicaragua. The resupply effort was part of what became known as the Iran-Contra Affair. On October 5, 1986, a SAM-7 missile struck a plane flying for the joint venture. Wallace Sawyer died in the crash. His wife, petitioner

Kasanee Sawyer, is the administratrix of his estate. Petitioner Eugene Hasenfus, who was on the airplane that crashed, survived but was imprisoned for three months.

Mr. Sawyer and Mr. Hasenfus started working for the joint venture in February 1986. Mr. Hasenfus was recruited and induced to join the venture by William Cooper and reached an oral agreement with Cooper as to the terms of his contract. [Record, 21-420-70 to 77.] After entering into the oral contract, Cooper had Mr. Hasenfus sign a written contract between himself and a "front" company called Corporate Air Service, Ltd. ("CAS Ltd."). [21-420-83 to 85; 22-421-173.] Mr. Hasenfus testified that Cooper agreed, on behalf of the respondents, that the written contract was a sham and that the oral contract was in force. [21-420-90.] The jury found that both Mr. Cooper and CAS Ltd. were the agents of respondents SAT and Secord. *See* 956 F.2d at 1563.

Mr. Sawyer and Mr. Hasenfus were hired to fly supplies for the joint venture into Nicaragua. Despite requests by pilots, respondents refused to purchase an Inertial Navigational System ("INS") for any of the airplanes, which petitioners assert caused the flights to take place in broad daylight. [*See*, *e.g.*, testimony of Elmo Baker, 25-424-628 to 629; 25-424-652 to 653.] Further, as detailed below, petitioners presented evidence by three witnesses that flying at night was much safer than flying during the daytime. *Ibid*. Participants in the resupply effort were told that there was no money for the INS. In fact, however, over $8 million in Swiss bank accounts was available to the joint venture. [30-429-1530.] Respondent Richard Secord testified that "[i]f the decision had been

made to buy an inertial navigation system, we would have found the money for it." [30-429-1457.]

As the Eleventh Circuit correctly stated, "Around midday on October 5, 1986, . . . Nicaraguan forces shot down a southern resupply flight with a heat-seeking missile. The missile strike killed Cooper, Sawyer, and a Contra aboard the flight. Hasenfus parachuted from the plane and survived, but Nicaraguan forces captured him the following day. Within three months, the Nicaraguan government tried, convicted, and pardoned Hasenfus." 956 F.2d at 1558. The Hasenfuses and Mrs. Sawyer filed separate lawsuits against respondents Southern Air Transport ("SAT") and Secord. The cases were consolidated and tried before a jury on claims of negligence, intentional and negligent misrepresentation, and breach of contract. Two other defendants, Corporate Air Service, Inc. and Albert Hakim, are not involved in this petition for certiorari.

Petitioners claimed at trial that respondents had formed a joint venture to operate the Contra resupply missions. In part, they asserted that although the joint venture had access to millions of dollars, it negligently failed to provide each of the resupply planes with an INS. With an INS, the participants in the resupply mission could have flown at night, which was much safer than daytime flights. Without an INS, night flights were impossible in southern Nicaragua. Mr. Hasenfus further claimed that his written contract did not terminate on the day the missile struck his airplane, because respondents' negligent failure to provide an INS caused the plane to be hit.

The district court directed a verdict on the issue of negligence, holding that "absent in the record is any evidence [that] had the aircraft been equipped with an INS,

the drops in Southern Nicaragua would have been made at night or even flying at night would have been safer." (The district court made its directed verdict rulings before Rule 50 of the Federal Rules of Civil Procedure was amended, eliminating use of the term "directed verdict.") The trial court further limited any contractual damages suffered by Mr. Hasenfus up to the day that his airplane crashed, because at that point he could no longer fly for the joint venture, even though petitioners claimed that respondents' negligence caused the crash and the resulting inability of Mr. Hasenfus to fly for the joint venture. Although the jury found that respondents Secord and SAT formed a joint venture to operate airplane resupply missions in Nicaragua, it awarded no damages to petitioners.

The Eleventh Circuit affirmed the District Court's directed verdicts. *See Hasenfus v. Secord*, 956 F.2d 1556 (11th Cir. 1992). In addressing petitioners' negligence claims, the court first recognized that "[w]itnesses testified that the southern resupply missions could have been flown at night if the planes contained the proper navigation equipment, and that such night flights would have been 'safer' than flying during the day." *Id.* at 1559. Nonetheless, the court held that there was insufficient evidence to submit the negligence claim to the jury. The court concluded that the testimony of petitioners' witnesses, Elmo Baker and James Wilburn, did not support the petitioners' claims. The court's review of the testimony of Baker and Wilburn is examined in detail in the following section of this petition. The court concluded that:

> Viewing [the] evidence in its entirety, we agree with the district court that [petitioners] did not introduce substantial evi-

> dence that the absence of an inertial navigational system proximately caused Sawyer's death. The testimony of Baker and Wilburn raises the possibility that equipping the plane with an INS would have prevented it from being shot down. But Baker and Wilburn's other statements, and the consistent testimony of the other witnesses, showed that equipping the plane with an INS probably would not have reduced the risk posed by surface-to-air missiles.

Id. at 1561. The court did not discuss the testimony of Mr. Hasenfus that it was much safer to fly at night.

With respect to Mr. Hasenfus' contract claim, the court stated that the "district court properly instructed the jury that the contract terminated the day the plane was shot down. While Hasenfus testified that he expected the benefits of his employment to extend beyond that date, he introduced no evidence that [respondents] made such promises." *Id.* at 1562. (In so holding, the court ignored substantial evidence of just such a promise, as discussed in the following section of this petition.)

On July 1, 1992, Petitioners filed a petition for rehearing in the Eleventh Circuit, pursuant to Rule 40 of the Federal Rules of Appellate Procedure. That petition was timely, because it was filed within 21 days of the entry of judgment. *See* 11th Cir. R. 40-2. Petitioners raised two issues in the petition for rehearing: 1) whether the district court erred in directing a verdict on Petitioners' claim that Respondents acted negligently by failing to provide an inertial navigational system; and 2) whether the district court erred by instructing the jury as a matter of law that

Mr. Hasenfus's contract terminated the day he was shot down. The court denied the petition for rehearing without explanation.

REASONS FOR GRANTING THE WRIT

I.

In holding that petitioners presented insufficient evidence of negligence, the Eleventh Circuit ignored and misstated evidence presented by petitioner, and improperly weighed petitioners' evidence against the evidence presented by respondents.

In reviewing the evidence of negligence, the Eleventh Circuit violated petitioners' due process rights, and sanctioned a departure by the trial court from the accepted and usual course of judicial proceedings. As demonstrated below, the petitioners were treated unfairly when the courts below refused to allow the jury to resolve disputed issues of material fact. To let the Eleventh Circuit's decision stand would undermine the integrity and fairness of the judicial system.

As discussed more fully below, the court of appeals made the following blatant errors in holding that respondents did not act negligently by failing to equip the plane with an INS:

1. The Eleventh Circuit erroneously concluded that "the most proximate cause" of the plane being hit was the need to fly low in order to hit the drop zones. 962 F.2d at 1560. The court cited testimony by Elmo Baker that the danger to airplanes at a height of 500 to 800 feet was the same at night as during the day. *Id.* at 1560 n.2. That

testimony is not relevant, however, because the plane was not low at the time it was hit. In fact, the plane was "very high," at least 3,000 feet when it was hit. No one, not even respondents, ever contended that the plane was flying at 500 to 800 feet when it was hit. Thus, as a matter of law, the proximate cause of the airplane crash could not have been the need to fly low while in the drop zone. Thus, the opinion is both factually and legally incorrect.

2. The court incorrectly characterized the testimony of James Wilburn by stating that he testified at one point that the "risk of a successful missile attack was the same day or night." *Id.* at 1561. As set forth below, Mr. Wilburn testified that the *missile* does not know the difference between day or night, but that the person firing the hand-held missile had much more difficulty finding the plane at night. In short, Mr. Wilburn never testified that flying at night was as dangerous as during the day; instead, he consistently testified that night flights were much safer.

3. The Eleventh Circuit failed to even mention the testimony of Mr. Hasenfus that it was "much more dangerous" to fly during the day than at night.

4. The Eleventh Circuit wrongly weighed the evidence in stating that the "majority of the testimony at trial held that safety and accuracy considerations militated in favor of daytime resupply flights in Southern Nicaragua." *Id.* at 1560. A reasonable jury could have believed the testimony of Baker, Wilburn, and Hasenfus that night flights were much safer, and discredited the testimony of two witnesses who provided the alleged "majority" testimony that daytime flights were favored.

A. In concluding that the "most proximate cause of Sawyer's death was the need to fly low," the Eleventh Circuit ignored uncontradicted evidence that the plane was not flying low when its was struck by the SAM-7 missile.

The Eleventh Circuit wrongly discounted the testimony of Elmo Baker. The court first acknowledged that Baker "testified that he would have flown the missions at night if appellees had equipped his plane with an inertial navigation system." 962 F.2d at 1560. The court, however, then noted that Baker also "stated that the risk of anti-aircraft missile fire at low altitudes was the same whether the missions were flown during the day or at night." *Ibid.* In support of that statement, the court cited to the following testimony by Baker:

> Q. Now, am I correct that to make these drops that we've been discussing in Nicaragua, for the equipment to land in a reasonable proximity to the drop zone, the plane would have to come down to perhaps 5 to 800 feet?
>
> A. Yes, that's correct.
>
> Q. And would that expose the plane to ground fire from anti-aircraft guns, missiles?
>
> Q. And at 5 to 800 feet, if there were Sandinista troops in the area, it wouldn't make much difference whether it was nighttime or daytime. Would it?

A. Not at that altitude.

Id. at 1560 n.2. Based on that evidence, the court stated the following:

> Thus, [petitioners'] witness established that the absence of an INS and the need to fly during the day did not proximately cause Sawyer's death. Rather, the most proximate cause of Sawyer's death was the need to fly low in order to hit the drop zones, thereby exposing the aircraft to missile fire. According to [petitioners'] witness, the risk of such fire at low altitudes was the same, day or night. Thus, the absence of night navigation equipment had no impact on the relevant risk.

962 F.2d at 1560.

The court erred in concluding that the "relevant risk" was the risk of flying at 500 to 800 feet. Uncontradicted testimony demonstrates that the airplane was far above that height when it was hit by the missile. Mr. Hasenfus, the only witness to testify on that issue, stated the following: "I don't know if we were descending that much. It appeared to me that I was -- we were quite high. I don't know our exact height." [22-421-187.] One of the attorneys for respondents then elicited more specific testimony from Mr. Hasenfus about the height of the plane when it was struck:

> Q. And by this time, as you were getting ready to drop, you were about 1,800 feet off the ground. Weren't you?

A. I disagree with that. We were more like 3,000 feet.

Q. You certainly were under the clouds. Weren't you?

A. We were neither above them nor underneath them. We were flying in and out of the clouds.

[22-421-191.] Thus, the uncontradicted testimony is that the plane was at 3,000 feet and not at a low altitude of 500 to 800 feet. Even respondents' lawyer contended that the plane was at 1,800 feet, which is far above the height at which Mr. Baker stated the risk was the same at day or night.

Based on the foregoing testimony, the Eleventh Circuit erred in holding that the "absence of night navigation equipment had no impact on the relevant risk." 962 F.2d at 1560. The court based that conclusion solely on Baker's testimony that the risk was the same when flying between 500 and 800 feet. There is no evidence, however, that the plane had dived down to that level to drop the supplies. Instead, the only relevant testimony is that the plane was flying at 3,000 feet when it was struck. Therefore, the court erred in holding that the most proximate cause of the plane crash was the need to fly low in order to drop the supplies.

B. The Eleventh Circuit distorted the testimony of James Wilburn, who stated that a hand-held missile cannot tell night from day but that the person firing the missile has far more difficulty finding the plane during the night than in daylight.

The Eleventh Circuit also misconstrued the testimony of James Wilburn. The court stated that Wilburn "testified specifically that the plane was an easier target for surface-to-air missiles during the day. At another point in his testimony, however, Wilburn stated that the risk of a successful missile attack was the same, day or night." 962 F.2d at 1560-1561 (footnotes omitted). In support of the latter assertion, the court quoted the following portion of Mr. Wilburn's testimony:

> Q. Mr. Wilburn, would the risk of a successful attack by a surface-to-air missile be different whether you're going in the daytime or the nighttime?
>
> A. The attack by the missile itself, no sir.

Id. at 1561 n.4. When placed in context, however, Mr. Wilburn's testimony does not support the court's conclusion but instead stands for the obvious proposition that the missile itself did not know whether it was day or night. Mr. Wilburn made that point clear in testimony that he gave before the question-and-answer quoted by the Eleventh Circuit panel:

> Q. And did you also tell me that this risk was not much different whether you flew in the daytime or the night?
>
> A. Well, from the -- the missile itself cannot distinguish day from night. Technically, there's no difference to the missile, day or night. The difference is to the operator, to the man who is going to shoot it. At night he can't see; so under the cover of darkness, you can hide. In the daytime the operator can see, and vision is man's most important sense. I think we talked about that last night. The missile itself technically is not sensitive to day or night. It's a heat seeker. And there's no real difference, day and night, to the missile itself from a technical aspect.

[24-423-545 to 546.]

By ignoring the foregoing testimony, the court erroneously concluded that "Wilburn stated that the risk of a successful missile attack was the same, day and night." 962 F.2d at 1561. The question-and-answer quoted by the court, id. at 1561 n.4, simply established the obvious point that a missile cannot distinguish day from night. After providing the testimony quoted by the court, Mr. Wilburn once again emphasized that night flights were safer: "You can still see further in the daytime than you can see at night, and this poor soul that's carrying this missile around on his shoulder can see you a lot further in the daytime than he can see you at night." [24-423-567.]

Thus, Wilburn was adamant in his testimony that it was safer to fly at night. The court's assertion to the

contrary is based on a distortion of the record that should not be countenanced. If the public is to have any faith in our judicial system, courts must not engage in the type of selective quotation used by the Eleventh Circuit. Even if there were some ambiguity in Wilburn's testimony, which there is not, it would be the jury's task to resolve the ambiguity. As this Court has stated, "in considering a motion for a directed verdict, the court does not weigh the evidence, but draws all factual inferences in favor of the nonmoving party." L*ytle v. Household Mfg., Inc.*, 494 U.S. 545, __ (1990).

C. The Eleventh Circuit failed to address the testimony of Eugene Hasenfus, who stated that it was much more dangerous to fly during the daytime than at night.

The Eleventh Circuit overlooked the testimony of Eugene Hasenfus in concluding that "[o]nly one witness, Wilburn, testified specifically that the plane was an easier target for surface-to-air missiles during the day" 962 F.2d at 1560 (footnote omitted). Mr. Hasenfus testified that "it was much more dangerous to fly during the day." [21-420-97.] Later in his testimony, Mr. Hasenfus explained that the SAM missile that struck the plane is a "heat-seeking missile. It has an electrical device on there. When it's turned on -- a person has to see this aircraft. When he holds the sites up on it, the sites will come together when it locks in; and at this time, he can ignite this missile, and it'll follow to its target." [22-421-177.] One of the attorneys for Respondents then attempted to get Mr. Hasenfus to admit that a SAM missile was equally effective at night because of a plane's flame signature, but Mr. Hasenfus did

not agree: "I believe he'd have an awful hard time hitting it. I really do. I don't think it'd lock in on it at all." [22-421-179.] The court's failure to even discuss that testimony, which was fully set forth in petitioners' briefs before that court, is impossible to understand.

D. The Eleventh Circuit improperly weighed the evidence in affirming the directed verdict.

Finally, the directed verdict is not justified by the Eleventh Circuit's conclusion that the "majority of the testimony at trial held that safety and accuracy considerations militated in favor of flying daytime resupply flights in Southern Nicaragua." 962 F.2d at 1560. First, the court's reference to the "majority of the testimony" is hard to decipher, because only two witnesses testified to that effect for respondents, while three witnesses--Baker, Wilburn, and Hasenfus--testified to the contrary.

Second, the issue is not what the "majority" of testimony was. The fact that two witnesses testified at length for respondents does not mean that their testimony somehow outweighs the testimony of petitioners' witnesses as a matter of law. A reasonable jury could discredit the testimony of respondents' witnesses and believe petitioners' witnesses, even if the trial court or the Eleventh Circuit might disagree with that assessment. Thus, the jury must assess any argument by respondents that day flights were as safe as night flights, or that other factors required day flights.

As a result, the Eleventh Circuit's opinion flies in the face of the law concerning directed verdicts. In weighing the evidence, the Eleventh Circuit erroneously construed the evidence in the light most favorable to respon-

dents, rather than petitioners. In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), this Court noted the following principles concerning directed verdict motions:

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor . . . Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court my not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.

The Eleventh Circuit has recognized in other cases that it must adhere to those principles. In *Therrell v. Georgia Marble Holdings Corp.*, 960 F.2d 1555, 1565 (11th Cir. 1992), the court stated:

> [W]e review the district court's grant of the directed verdict under the normal standard: Viewing the evidence "in the light and with all reasonable inferences most favorable to the party opposed to the motion[,] [i]f the facts and inferences points so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motion . . . is proper." *Buckley v.*

Hospital Corp. of America, Inc., 758 F. 2d 1525, 1527 (11th Cir. 1985) (quoting *Boeing v. Shipman*, 411 F. 2d 365, 374 (5th Cir. 1969) (en banc)).

Contrary to those principles, the Eleventh Circuit in this action misconstrued the testimony of Elmo Baker and James Wilburn, ignored the testimony of Eugene Hasenfus, and weighed the evidence presented by petitioners and respondents. As a result, the Court invaded the province of the jury and incorrectly affirmed the directed verdict. In reversing a directed verdict, the *Therrell* panel of the Eleventh Circuit stated that "[a]lthough it appears that Dr. McCarl [lost] credibility with the court, such loss of credibility is not a justification for issuing a directed verdict. '[I]t is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of the witnesses.'" *Therrell*, 960 F.2d at 1567. The panel in this case failed to follow that settled law. As a result, its opinion is in conflict with *Therrell* and numerous other cases concerning directed verdicts.

II.

In holding that Mr. Hasenfus introduced no evidence that respondents promised to pay him benefits after the plane was shot down, the Eleventh Circuit ignored the jury's finding that William Cooper was respondents' agent, and overlooked evidence that Cooper promised that respondents would pay such benefits.

In reviewing Mr. Hasenfus' contract claim, the Eleventh Circuit violated his due process rights and sanc-

tioned a departure by the trial court from the accepted and usual course of judicial proceedings, by ignoring important testimony. Mr. Hasenfus appealed the district court's ruling that the jury could only award him damages for breach of contract up until October 5, 1986, the day he was shot down. Because Mr. Hasenfus did not claim any contractual damages prior to that date, that ruling made his contractual claim moot. The Eleventh Circuit stated that such an instruction was correct, however, because "[w]hile Hasenfus testified that he expected the benefits of his employment to extend beyond that date, he introduced no evidence that [respondents] made such promises." 962 F.2d at 1562. That conclusion overlooks two facts: 1) the jury found that William Cooper was the Respondents' agent; and 2) Mr. Hasenfus testified that Cooper made those promises to him as part of his contract, whether written or oral. Therefore, there is substantial evidence that Respondents made such promises, and the Eleventh Circuit's bald conclusion to the contrary is impossible to understand.

At one point in the opinion, the Eleventh Circuit acknowledged "the jury's finding that Cooper and CAS were [respondents'] agents." *Id.* at 1563. Further, Hasenfus testified that he and Cooper "had a small discussion on employment through the time William Cooper met me at the airport until [we retired for the evening]." [21-420-77.] Hasenfus then testified that he accepted employment on the following conditions: "The terms were based at a base salary of $3000.00 a month and that all insurance and death benefits and, if there would be cause for--if anything would happen, all endeavors would be taken care of." *Ibid.* Hasenfus further clarified that although his written contract did not include all of the terms of his agreement, the oral contract included all of "the terms described with William

Cooper." [21-420-90 to 91.] Hasenfus also testified that he attempted to get the expenses paid and that he never received any notification of termination of employment. [21-420-139 to 140.] Thus, there is substantial evidence that respondents, through Cooper, promised Hasenfus that he would be compensated for expenses incurred after the plane was shot down, either through his written contract or the oral agreements.

The petition should be granted as to this issue, as well as the negligence issue, because both issues rest on a common error. As discussed above, there is substantial evidence from which a jury could conclude that respondents negligently caused the plane to be shot down. If the jury reached that conclusion, then the doctrines of impossibility and frustration would not result in the termination of the contract -- whether written or oral -- on the day the plane was struck. *Equitrac Corp. v. Kenny, Nachwalter & Seymour, P.A.*, 493 So. 2d 548, 548 (Fla. 3d DCA 1986) (per curiam) (contract is terminated under doctrines of impossibility and frustration only when "the purpose for which the subject contract was formed became entirely frustrated. . . due to no fault of either party"). Thus, since the contract could no longer be performed because of Respondents' negligence, the "measure of damages for the breach of a contract to furnish services is the amount of profit the non-breaching party would have earned during the remainder of the term of the contract had there been no breach." *Physicians Reference Laboratory, Inc. v. Daniel Seckinger, M.D. & Associates*, 501 So. 2d 107, 108 (Fla. 3d DCA 1987).

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted. The Eleventh Circuit's opinion demonstrates a disdain for the due process rights of petitioners. That court misstated some testimony and utterly ignored crucial testimony presented by petitioners. The Eleventh Circuit's conduct was so egregious as to constitute a drastic departure from the accepted and usual course of judicial proceedings, and to violate petitioners' due process rights to a fair hearing. Therefore, this petition should be granted.

Respectfully submitted,

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OPINION 1

Eugene HASENFUS and Sally Hasenfus, Plaintiffs-Appellants,

v.

Richard SECORD, an individual, Corporate Air Services, A Pennsylvania corporation; Southern Air Transport, a Florida corporation; albert Hakim, an individual, Defendant-Appellees.

Kasanee SAWYER, an individual, Kasanee Sawyer,Administratrix of Sawyer, Wallace B., Deceased, Plaintiffs-Appellants,

v.

Richard SECORD, an individual, Corporate Air Services,Southern Air Transport, a Florida corporation, Albert Hakim, an individual, et al., Defendants-Appellees.

Nos. 91-5106, 91-5107.

United States Court of Appeals,
Eleventh Circuit.
June 15, 1992.

Before HATCHETT, Circuit Judge, JOHNSON and HENDERSON, Senior Circuit Judges.

HATCHETT, Circuit Judge:

We affirm the district court's ruling that Richard Secord, Albert Hakim, Southern Air Transport (SAT) and Corporate Air Services (CAS) are not liable to Eugene and Sally Hasenfus and Kasanee Sawyer for damages resulting from covert air missions to resupply the Nicaraguan "Contras."

FACTS

In 1985, the United States Congress discontinued funding for the "Contras," a military force seeking to overthrow the Nicaraguan government. Soon thereafter, Oliver North, a United States Marine Corps lieutenant colonel and National Security Council aide, undertook to arrange covert funding for the Contra rebels. North solicited Richard Secord, a retired Air Force general, to organize an airlift operation into Swiss bank accounts over which he maintained discretion and control.

Secord engaged Richard Gadd to organize the airlift. Gadd worked with Southern Air Transport (SAT) and Corporate Air Services (CAS) in arranging various services required for the operation, such as maintaining aircraft and hiring personnel.

In early 1986, CAS hired Wallace B. Sawyer, Jr., an Air Force Academy graduate and an experienced combat pilot. William Cooper, also an experienced combat pilot, served as the "on-site manager" for the operation at Ilopango Air Base in El Salvado and as a pilot. Eugene Hasenfus, a former Marine paratrooper, joined the operation as an "air freight specialist."

Secord and his agents directed the air drops to Contras concentrated in the northern and southern parts of Nicaragua. The northern air drops were relatively easy,

involved short distances, and could be undertaken at night. The southern air drops were far more difficult, required seven-hour round trips, and, for various reasons discussed later, were flown during the day.

During 1986, several successful air drops were completed. Around midday on October 5, 1986, however, Nicaraguan forces shot down a southern resupply flight with a heat-seeking missile. The missile strike killed Cooper, Sawyer, and a Contra aboard the flight. Hasenfus parachuted from he plane and survived, but Nicaraguan forces captured him the following day. Within three months, the Nicaraguan government tried, convicted, and pardoned Hasenfus. By Christmas, he was back home in the United States.

PROCEDURAL HISTORY

Eugene and Sally Hasenfus and Kasanee Sawyer (appellants) sued Secord, his partner, Albert Hakim, SAT, and CAS (appellees).[1] The Hasenfuses' third amended complaint alleged: (I) breach of Eugene Hasenfus's written employment contract with CAS; (II) breach of an oral contract to pay Hasenfus's legal expenses arising from the trial in Nicaragua; (III and IV) intentional and negligent misrepresentation relating to the promise to pay Hasenfus's Nicaraguan legal expenses; and (V) conversion of Hasenfus's papers and personal effects in an attempt to cover-up the resupply operation. Sawyer's complaint alleged: (I) breach of an oral contract with CAS to pay salary, expenses, and a death benefit; (II) negligent failure to provide safe aircraft and required safety equipment; (III

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[1] The Hasenfus and Sawyer cases were consolidated for trial. CAS and Hakim were dismissed for insufficient service of process.

and IV) intentional and negligent misrepresentation contained in promises to provide safe aircraft and proper safety equipment; and (V) wrongful death as a result of the alleged negligence.

The district court dismissed the appellants' claims that the appellees were strictly liable for Hasenfus's injuries and Sawyer's death. At the close of all the evidence, the district court entered directed verdicts for appellees on the Hasenfuses' conversation claim and on Sawyer's negligence, misrepresentation, and wrongful death claims. Thus, the following claims went to the jury for special verdicts: (1) the Hasenfuses' written contract claim; (2) the Hasenfuses oral contract claim relating to the promises to pay for Eugene's Nicaraguan trial expenses; and (3) Sawyer's claim that appellees breached an oral agreement to pay salary, expenses, and a death benefit. The jury found that SAT and Secord engaged in a joint venture, and that CAS and other persons acted as Secord's and SAT's agents. Nonetheless, the jury found for Secord and SAT on all liability issues.

ISSUES

The issues presented are: (1) whether the trial court erred in entering directed verdicts for appellees on Sawyer's negligence and misrepresentation claims; (2) whether the trial court erred in its instructions to the jury on Hasenfus's contract and misrepresentation claims; (3) whether the trial court erred in the special verdict form submitted to the jury on Sawyer's contract claim; and (4) whether the trial court erred in denying appellees' motion for a directed verdict on joint venture and agency.

DISCUSSION

A. The Directed Verdicts

This court reviews *de novo* the district court's entry of a directed verdict. The district court should grant a motion for directed verdict if "the facts and inferences point overwhelmingly in favor of one party such that reasonable people could not arrive at a contrary verdict." *Carter v. City of Miami*, 870 F.2d 578, 581 (11th Cir. 1989). The court must consider "all the evidence and the inferences drawn therefore in the light most favorable to the nonmoving party." *Carter*, 870 F.2d at 581. We may not affirm the district court's entry of a directed verdict if the record contains "substantial evidence" opposing the motion. *Carter*, 870 F.2d at 581. "A mere scintilla of evidence," however, is not sufficient to defeat the motion. *Carter*, 870 F.2d at 581; *see also Boing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc).

1. *The Negligence Claim*

Sawyer contends that she introduced sufficient evidence to defeat the motion for directed verdict on her negligence claim. Witnesses testified that the southern resupply missions could have been flown at night if the planes contained the proper navigation equipment, and that such night flights would have been "safer" than flying during the day. Sawyer also argues that appellees negligently failed to provide the crew with adequate safety equipment, such as parachutes and survival kits. Appellees respond that they were not negligent in equipping the plane or the crew. Alternatively, any negligence did not proximately cause Sawyer's death. Finally, appellees argue that they are not liable because Sawyer assumed the risk of

death when he agreed to fly supply missions over hostile territory.

While the facts of this case are unusual, the legal principles we must apply are well established. To prevail in a negligence action, the plaintiff must show: (1) that the defendant owed a duty of reasonable care to the plaintiff; (2) that the defendant breached that duty; (3) that the breach was the proximate cause of the injury to the plaintiff; and (4) that the plaintiff suffered damages. *See e.g., Rupp v. Bryant*, 417 So.2d 658, 668 n.27 & accompanying text (Fla. 1982); *Reinhart v. Seaboard Coast Line R.R. Co.*, 422 So.2d 41, 43 (Fla.App. 1982), *petition den.*, 431, So.2d 989 (1983). Failure to establish any one of these elements is fatal to the plaintiff's case. *See, e.g., Gooding v. University Hospital Bldg., Inc.*, 445 So.2d 1014, 1018 (Fla.1984) (defendant entitled to directed verdict because plaintiff failed to establish proximate cause, even though plaintiff established other elements of negligence case). Under Florida law, the plaintiff must introduce sufficient evidence from which a reasonable jury could conclude that the defendant's negligence was the probable cause of the plaintiff's injury. *See Hessen v. Jaguar Cars*, 9015 F.2d 641, 647 (11th Cir. 1990). The trial court may decide on a motion for directed verdict whether the plaintiff has introduced sufficient evidence to carry this burden before the jury:

> [The plaintiff] must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result. A mere possibility of such causation is not enough; and when the matter remains one of

> pure speculation or conjecture or the probabilities are at best evenly balanced it becomes the duty of the court to direct a verdict for the defendant.

Gooding, 445 So.2d at 1018 (quoting Prosser, Law of Torts § 41 (4th ed. 1971)). In this case, no reasonable person could conclude from the evidence presented that appellees' alleged negligence proximately caused Sawyer's death.

All of the witnesses testified that conditions in southern Nicaragua required that the air drops be made with pinpoint accuracy. Because of the dense jungle, supplies could be lost if the crew missed the drop zone by even the shortest distance. According to the testimony at trail, the only way to achieve the required accuracy was to fly over the drop zone at altitudes of 400 to 800 feet. Flying at such low altitudes exposed the planes to missile, anti-aircraft, and small arms fire.

The majority of the testimony at trial held that safety and accuracy considerations militated in favor of daytime resupply flights in southern Nicaragua. But Sawyer's witness, Elmo Baker, testified that he would have flown the missions at night if appellees had equipped his plane with an inertial navigation system (INS). Baker and another witness, James Wilburn, testified that night flights would have been "safer." At another point in his testimony, however, Baker stated that the risk of anti-aircraft and missile fire at low altitudes was the same whether the missions were flown during the day or at night.[2] Thus,

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[2] A. Yes.
Q. And at five to eight hundred feet if there were Sandinista troops in the area it would-
(continued...)

appellants' witness established that the absence of an INS and the need to fly during the day did not proximately cause Sawyer's death. Rather, the most proximate cause of Sawyer's death was the need to fly low in order to hit the drop zones, thereby exposing the aircraft to missile fire. According to appellants' witness, the risk of such fir at low altitudes was the same, day or night. Thus, the absence of night navigation equipment had no impact on the relevant risk.

Only one witness, Wilburn, testified specifically that the plane was an easier target for surface-to-air missiles during the day.[3] At an0ther point in his testimony, however, Wilburn stated that the risk of a successful missile attack was the same, day or night.[4] Two other expert witnesses testified at length that day flying offered an equal

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[2](...continued)

n't make much difference if it was nighttime or daytime, would it?

A. Not at that altitude.

[3] Wilburn testified:

> You can still see further in the daytime than you can see at night and this poor soul that's carrying this missile around on his shoulder can see you a lot further in the daytime than he can see you at night. And with that in mind, I would much prefer personally to fly at night.

[4] The following exchange occurred during Wilburn's cross-examination:

Q. Mr. Wilburn, would the risk of a successful attack by a surface-to-air missile be different whether you're going in the daytime or the nighttime?

A. The attack by the missile itself, no sir.

or better chance of survival against surface-to-air missiles than night flying.

Viewing this evidence in its entirety, we agree with the district court that appellants did not introduce substantial evidence that the absence of an inertial navigation system proximately caused Sawyer's death. The testimony of Baker and Wilburn raises the possibility that equipping the plane with an INS would have prevented it from being shot down. But Baker and Wilburn's other statements, and the consistent testimony of the other witnesses, showed that equipping the plane with an INS probably would not have reduced the risk posed by surface-to-air missiles. Because appellants' case raised no more than a possibility that appellees' negligence was the proximate cause of their injury, the district court was obligated to direct a verdict for appellees. *Gooding*, 445 So.2d at 1018.

Sawyer's negligence claim based on the purported lack of safety equipment similarly fails for absence of causation. Sawyer introduced no evidence that Wallace Sawyer would have survived the missile attack if he had been furnished a parachute and a survival kit. Indeed, the only relevant evidence in the record, Eugene Hasenfus's compelling eyewitness testimony, indicated that the other crew members had little chance to escape from the plane after the missile hit. Appellants' evidence did not raise the possibility, much less the probability, that Sawyer would have survived the crash if provided proper safety equipment. Similarly, appellants introduced no evidence that

Hasenfus would have been rescued if provided with a radio.[5]

2. *Sawyer's Misrepresentation Claim*

Sawyer contends that the district court erred in directing a verdict for appellees on her intentional and negligent misrepresentation claims. Sawyer argues that appellees induced her husband to continue flying Contra resupply missions with promises of airplane repairs and better safety equipment. According to Sawyer, her husband would not have continued to participate in the operation but for appellees' promises.

To prevail on her claim of intentional misrepresentation,Sawyer must show:

> (1) a false statement of fact; (2) known by the defendant to be false at the time it was made and (3) made for the purpose of inducing the plaintiff to actin reliance thereon; (4) action by the plaintiff in reliance on the correctness of the representations; and (5) resulting damage to the plaintiff.

Stowell v. Ted S. Finkel Investment Services, Inc., 641 F.2d 323 (5th Cir. Unit B 1981) (applying Florida law); *see also Royal Typewriter Co. v. Xerographic Supplies*, 719 F.2d 1092, 1103 (11th Cir. 1983). To prevail upon her claim of negligent misrepresentation, Sawyer must establish the same five elements with one modification. With respect to the

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[5] We do not consider Hasenfus's belated claim that Cooper negligently followed a flight path that increased the danger of missile attack. The claim first appeared in appellants' motion for a new trial. The district court either ignored the claim, with it was entitled to do under the circumstances, or grouped it with appellants' other negligence claims in ruling that appellants failed to demonstrate proximate cause.

second element, Sawyer need only show that appellees negligently failed to ascertain the truth or falsity of the representation. *See Emerson Electric Co. v. Farmer*, 427 F.2d 1082, 1087-88 (5th Cir. 1970) (applying Florida law).

Like her negligence claim, Sawyer's misrepresentation claims fail for lack of proximate cause. To prevail on her misrepresentation claim, Sawyer must show that her husband's reliance on appellees' misrepresentations caused his death. *See Stowell*, 641, F.2d at 325. Viewing the evidence in the light most favorable to Sawyer, however, she proved only that appellees' misrepresentations induced her husband to continue working for C.A.S. The pilots made the decision to fly each mission. Sawyer does not claim that in making the decision to fly on October 5, 1986, her husband relied upon any representations about the condition of the plane. To the contrary, the evidence showed that Sawyer, an experienced combat pilot, knew the condition of the plane he flew. To the extent that the plane lacked important navigational equipment, Sawyer was fully aware of that fact. Thus, in undertaking the action that led to his death--embarking on the ill-fated mission--Wallace Sawyer did not rely upon any misrepresentation by appellees. Instead, he relied on facts fully within his knowledge. Because Sawyer cannot demonstrate a causal link between appellees' representations about improved equipment and Sawyer's decision to fly on October 5, 1986, Sawyer cannot prevail on her misrepresentation claim.

B. The Jury Instructions and Special Verdict Forms

Appellants contend that errors in the jury instructions and special verdict forms require a new trial. The Hasenfuses argue that the district court failed to instruct the

jury on Eugene's oral contract claim and erroneously instructed the jury that the contract terminated on October 5, 1986. The Hasenfuses also argue that the district court failed to instruct the jury on their theory that Elliott Abrams and William Schofield, two State Department officials, acted as appellees' agents. Sawyer argues that the district court committed error in the special verdict form when it failed to ask specifically whether a contract existed between Sawyer and appellees' agents.

This court reviews the district court's denial of a motion for a new trial for abuse of discretion. *Blu-J, Inc. v. Kemper C.P.A. Group*, 916 F.2d 637, 643 (11th Cir. 1990). In reviewing jury instructions, we must "view the challenged instructions as part of the entire charge, in view of the allegations of the complaint, the evidence presented, and the arguments of counsel, to determine whether the jury was misled and whether the jury understood the issues." *Johns v. Jarrard*, 927 F.2d 551, 554 (11th Cir. 1991) (quoting *National Distillers and Chemical Corp. v. Brad's Machine Products, Inc.*, 666 F.2d 492, 497 (11th Cir. 1982) (internal quotations omitted)). Special verdict forms must enable the jury to resolve essential facts logically and consistently. *See Burger King Corp. v. Mason*, 710 F.2d 1480, 1489 (11th Cir. 1983), *cert. denied*, 465 U.S. 1102, 104 S.Ct. 1599, 80 L.Ed.2d 130 (1984).

The district court committed no reversible error in the jury instructions or special verdict forms. Contrary to the Hasenfuses' contentions, the district court carefully instructed the jury that it could find an oral agreement existed between Hasenfus and appellees. Moreover, the district court properly instructed the jury that the contract terminated the day the plane was shot down. While

Hasenfus testified that he expected the benefits of his employment to extend beyond that date, he introduced no evidence that appellees made such promises.

Similarly, the district court did not err in refusing to instruct the jury that Schofield and Abrams were appellees' agents as a matter of law. The record evidence was insufficient to support such an instruction. In any event, the district court did not preclude the jury from finding that Schofield and Abrams were appellees' agents. The court's instruction asked whether "William Cooper or anyone acting for Corporate Air Services, Ltd. was an agent of the defendants." The court allowed the Hasenfuses to present all their evidence on the Schofield/Abrams agency issue, and it allowed them to argue it fully before the jury. Thus, the arguments and evidence, coupled with the instruction given, fairly presented this issue to the jury.

Finally, the district court did not err in the special verdict form on Sawyer's contract claim. The form first asked the jury to determine whether Cooper or CAS were agents of appellees at the time Sawyer signed the written contract. The form next asked the jury to determine whether a contract existed between Sawyer, on the one hand, and Secord or SAT, on the other hand. From the court's instructions on agency, and the jury's finding that Cooper and CAS were appellees' agents, the jury could conclude that the question about Sawyer's contract incorporated the possibility of an agreement between Sawyer and appellees' agents. In the context of the trial, the court's instructions did not fail to inform the jury that it could find an oral contract between Sawyer and appellees' agents.

C. Joint Venture and Agency

Appellees' challenge to the district court's denial of their motion for a directed verdict on joint venture and agency is also without merit. The record contained sufficient evidence from which a reasonable jury could find joint venture and agency.

CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED.

JOHNSON, Senior Circuit Judge, concurring specially:

Although I agree with all of the results reached by the majority and most of the reasoning underlying those results, I write separately to note my disagreement with the majority's causation analysis regarding Sawyer's misrepresentation claims. *See supra*, opinion at 1561-1562. The majority states that, although it found evidence that Sawyer's husband would not have continued to work for the defendants but for the alleged misrepresentation, Sawyer had not established the requisite causal link between the alleged misrepresentation and her husband's death. According to the majority, Sawyer must prove that the alleged misrepresentation induced her husband's decision to board the precise flight that resulted in his death. In other words, even if Sawyer had demonstrated that her husband would not even have worked for the defendants at the time of his death absent the alleged misrepresentation, she would not have established a sufficient causal nexus. The majority cites no authority supporting the extremely onerous burden

of proof that it imposes on Sawyer, and I can see no justification for it.

Nonetheless, I concur in the result because the ground asserted by the district court is sufficient to justify our affirmance of the directed verdict. The district court found no evidence whatsoever that the alleged misrepresentation was even uttered to Sawyer's husband, and Sawyer fails to cite this Court to any such evidence. Without evidence of this essential element, the directed verdict was proper.

OPINION 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

EUGENE HASENFUS, an individual, and SALLY HASENFUS, an individual,
Plaintiffs,
vs.
RICHARD SECORD, an individual, and SOUTHERN AIR TRANSPORT, INC., a Florida Corporation,
Defendants.
_____/

Case No. 88-1841-CIV-ATKINS

KASANEE SAWYER, an individual; and KASANEE SAWYER, Administratrix of WALLACE B. SAWYER, Deceased,
Plaintiffs,
vs.

Case No. 88-1850-CIV-ATKINS

RICHARD SECORD, an individual, and SOUTHERN AIR TRANSPORT, INC., a Florida Corporation,
Defendants.
_____/

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR DIRECTED VERDICT

THIS CAUSE is before the Court on Defendants' Motion for Directed Verdict.[1] After careful consideration of the motion, the response, the relevant law and upon hearing arguments on this motion, it is

ORDERED AND ADJUDGED that the defendants' Motion for Directed Verdict is GRANTED IN PART and DENIED IN PART as follows:

(1) The motion is denied as to the joint venture and agency theories of liability;

(2) The motion is denied as to Eugene Hasenfus' claim for breach of written contract;

(3) The motion is denied as to Sally Hasenfus' claims for breach of oral contract, intentional misrepresentation and negligent misrepresentation;

(4) The motion is granted as to Eugene Hasenfus' claim for conversion;

(5) The motion is denied as to the Sawyers' claim for breach of contract; and

(6) The motion is granted as to the Sawyers' claim for negligence, intentional misrepresentation, negligent

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[1] Defendant Richard Secord filed the motion for directed verdict and defendant Southern Air Transport, Inc. joined the motion by stating such on the record in open court. This Order supplements the Court's Order granting in part and denying in part defendants' motion for directed verdict which was announced to all the parties in open court on August 17, 1990, at the close of all the evidence.

misrepresentation and the wrongful death claim which was based on the above causes of action.

I.

FACTS AND BACKGROUND INFORMATION

The facts and general background of the present case are set forth in prior court orders, and the familiarity with those facts is presumed. See Order Granting in Part and Denying in Part Defendant Southern Air Transport's Motion to Dismiss (March 29, 1989) ("Order on Motion to Dismiss"), at 2-4; Order Denying Defendant Richard Secord's Motion to Dismiss Plaintiffs' Amended Complaint (May 3, 1990) ("Order on Motion to Dismiss"), at 1-3; Order Granting in Part and Denying in Part Defendant Southern Air Transport's Motion for Summary Judgment (July 24, 1990) ("Order on Motions for Summary Judgment"), at 1-4.

A brief representation of the facts follows. This case arises out of the covert attempt to supply arms to the so-called Contra forces in Nicaragua. In 1985, a resupply operation was organized which was to include a series of privately funded airlifts designed to support the Contra forces. Amalgamated Commercial Enterprises ("ACE")[2] was acquired and an ACE bank account set up to facilitate the transfer of funds necessary to run the operation. Two aircraft were purchased, and Corporate Air Services ("CAS"), Ltd. was established as a corporation under the laws of El Salvador. William Cooper, who was evidently employed by CAS, Ltd., recruited various people including

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[2] "ACE" was described as a "shelf corporation" purchased in Panama where the ACE bank account was established. One of Southern Air Transport's Officers went to Panama for this purpose.

Eugene Hasenfus and Wallace B. Sawyer to participate in the covert operation. Southern Air Transport ("SAT") also participated in the resupply missions.

The agreement allegedly reached between Hasenfus and Cooper and/or CAS, Ltd. is evidence by an "Independent Contractor Agreement" which was signed by Cooper on behalf of CAS, Ltd. and admitted into evidence during the trial. Likewise, a similar document was submitted into evidence on behalf of Sawyer; however, only Sawyer's signature appeared on that document.

Several successful missions occurred before the resupply operation terminated sometime in 1986. On October 5, 1986, one of the resupply planes piloted by Wallace B. Sawyer and William Cooper was shot down over Nicaragua. Sawyer and Cooper died in the crash. The only survivor of the crash was Eugene Hasenfus, whose job was to push the necessary packages out of the aircraft when it flew over the designated zones. It was later determined that the plane was struck by an unseen heat-seeking missile. Hasenfus was captured, imprisoned, and three months later, pardoned and set free by the Nicaraguan government.

II.

DISCUSSION

A. General Principles for Directed Verdict Motions.

The standard for a directed verdict under Rule 50(a) mirrors the standard for summary judgment under Rule 56(c). See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). Thus, a directed verdict or summary judgment must be entered against any party if the evidence

is such that a reasonable jury could not return a verdict for the nonmoving party. Id. at 248. At this state, it is not the court's function to weigh the evidence but to determine whether there is a genuine issue for trial. Id. at 249. It is within the power of the trial court to direct a verdict at any point in the trial where it is apparent that there is a complete absence of any question to send to the jury. Best v. District of Columbia, 291 U.S. 411, 415 (1933).

The standards applicable to motions for directed verdicts were first set forth in this circuit in the case of Boeing Company v. Shipman, 411 F.2d 365 (5th Cir. 1969) (en banc),[3] where the Fifth Circuit stated that:

> If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motion is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury.

Id. at 374. In making these determinations the evidence must be viewed in the light most favorable to the

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[3] The law of the Fifth Circuit through October 1, 1981 is the law of the Eleventh Circuit. Bonner v. City of Pritchard, 661 F.2d 1206 (11th Cir. 1981) (en banc).

nonmoving party. Id. at 375. Recent cases in the Eleventh Circuit have continued to follow the standards set forth in Boeing and the dictates of the Supreme Court cases in this area. See Carter v. City of Miami, 870 F.2d 578 (11th Cir. 1989); Dancey Company, Inc. v. Borg-Warner Corporation, 799 F.2d 717 (11th Cir. 1986).

As to the timing of the motion, it is entirely proper for the court to grant a motion for directed verdict at the close of all the evidence. See United v. Vahlco Corporation, 720 F.2d 885, 889 (5th Cir. 1983) (district courts should not jump the gun but should wait until both sides have presented their evidence before ruling on motions for directed verdict); C. Wright and A. Miller, Federal Practice and Procedure: Civil section 2533 (1971) (better practice to defer ruling on motion for directed verdict until both sides have rested).

B. Application to the Present Facts.

In the present case, the Court must engage in a two-part directed verdict inquiry. The Court must first determine whether there exists sufficient evidence form which a jury could reasonably impose vicarious liability on the defendants. Assuming plaintiffs satisfy this threshold requirement, the Court must then apply the directed verdict standards to the substance of each count.

1. Vicarious Liability.

Vicarious liability in this case can be demonstrated through two theories: joint venture and agency. A "joint venture" has been defined as a "special combination of two or more persons, who in some specific venture, seek a profit jointly without the existence between them of any actual partnership, corporation, or business entity." Florida

Tomato Packers, Inc. v. Wilson, 296 So. 2d 536, 539 (Fla. Dist. Ct. App. 1974). Joint ventures can also be comprised of corporations. Id. To support a finding of a joint venture, the relationship between the parties must consist of the following elements:

> (1) a common purpose; (2) a joint proprietary interest in the subject matter; (3) the right to share profits and the duty to share losses; and (4) the right of joint control.

Pinnacle Port Community Association, Inc. v. Orenstein, 872 F.2d 1536, 1539 (11th Cir. 1989) (setting forth requirements under Florida law). If each of these elements is present, then: (1) the parties are said to be joint venturers; and (2) a third party plaintiff may impose liability against one venturer for the actions undertaken in furtherance of the enterprise by a co-venturer. See Conner v. Southland Corp., 240 So. 2d 822, 825 (Fla. Dist. Ct. App. 1970).

Applying these principles to the facts of the present case, the Court concludes that the plaintiffs have adduced sufficient evidence from which a jury could conclude that the plaintiffs sustained injuries from parties acting pursuant to a joint venture. For a detail of the facts in support of this conclusion see pages 12 through 15 of this Court's Order on Motions for Summary Judgment dated July 24, 1990. In considering the evidence in the light most favorable to the plaintiffs, the motion for directed verdict must be denied as to the joint venture theory.

The other vicarious liability theory is the agency theory. Florida law provides that:

> a principal is liable if his actions or words operate to hold out the agent a possessing authority to act on behalf of the principal, thereby vesting apparent authority in the agent.

Smith v. United States, 599 F. Supp. 606, 608 (S.D. Fla. 1984) (construing Florida law). This general rule is, however, qualified by the specific requirement that a principal can be held liable for the acts of its agent only if those acts are undertaken within the scope of the agency. See Acme Oil v. Vasatka, 465 So.2d 1314, 1317 (Fla. Dist. Ct. App. 1985).

Applying these principles to the facts of the present case, the Court concludes that the plaintiffs have adduced sufficient evidence from which a jury could conclude William Cooper and/or CAS, Ltd. acted as agents of the defendants. Specifically, there was evidence tending to show that William Cooper operated out of SAT's Miami offices and wore a badge which identified him as being associated with SAT. See Hasenfus Affidavit, paras. 3-4 and his testimony during the trial. There is also evidence from which a jury could infer that SAT had some degree of control over the employee hiring decisions made by CAS, Ltd. See Stevenson Affidavit, para. 12 (SAT would forward to Stevenson, a CAS, Ltd. mechanic, the names of people SAT wished to see hired). Therefore, the motion for direct verdict as to the agency theory is denied.

2. The Substantive Counts.

In this case, the Hasenfuses, through their Third Amended Complaint, seek damages from all the defendants based on the following theories: (1) breach of written contract; (2) breach of oral contract; (3) breach of inten-

tional and/or negligent misrepresentation; and (4) conversion. Likewise, the Sawyers' Third Amended Complaint charges the defendants with: (1) breach of contract; (2) negligence; (3) intentional and/or negligent misrepresentation; and (4) wrongful death which is based on the above counts. The defendants have moved for a directed verdict against the plaintiffs on all their counts.

a. **Breach of Contract Counts.**

As noted above, the first two counts of the Hasenfus' complaint seek relief based on breach of written contract and breach of oral contract, respectively. Sawyer also asserts a claim for breach of contract on behalf of the deceased, Wallace B. Sawyer.

Eugene Hasenfus' claim for breach of written contract withstands the motion for directed verdict because there exists sufficient evidence from which a jury could infer the existence of a contract and a breach thereof in the form of money due and owing under the contract. Admitted into evidence was a document entitled "Independent Contractor Agreement" which was signed by Eugene Hasenfus and William Cooper for CAS, Ltd. Plaintiffs do not dispute the existence or authenticity of this document. At trial, Eugene Hasenfus testified he considered himself employed by SAT and was paid money for his services and that said funds were wired on a regular basis, until the crash, into his bank account. The motion for directed verdict is denied as to this count.

Sally Hasenfus' claim for breach of oral contract stems from her allegations that the defendants through their agents made representations to her concerning the payment of her expenses, including legal costs to obtain her husband's release. In support of her allegations, she

testified at trial that she was paid $6,000.00 in cash in a brown paper bag which was to defray her expenses. She testified that no such legal defense fund to help pay the expenses was provided which caused the Hasenfus family to spend their own money and savings in an attempt to free Eugene Hasenfus. This claim also withstands the motion for directed verdict since the jury could infer through various events at the time that Sally Hasenfus had such a contract with the defendants, through their agents or joint venturers.[4]

The Sawyers' complaint also includes a breach of contract count alleging that defendants breached the contract by failing to pay Sawyer his full salary or to reimburse Kasanee Sawyer for expenses arising from Sawyer's death and for death benefits. In evidence was a document signed only by Sawyer entitled "Independent Contractor Agreement" which closely matched the Hasenfus Independent Contractor Agreement also in evidence. The document with Sawyer's signature included the amount per month which was to be received. Kasanee Sawyer testified that her husband took care of most of the finances, and that money was transferred to the account she was authorized to use. She did not, however, have any knowledge of where the money came from.

Although there was no direct evidence in support of death benefits as part of the contract, the jury could have inferred such benefits from the evidence presented at trial. For example, Richard Secord's testimony at trial concerning

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[4] Admittedly, the evidence tending to prove the existence of an oral contract is very weak; however, considering the circumstances and events occurring in this case, this claim must go forward.

the fact that he tried to get money to the families could be inferred by the jury to imply that certain death benefits were to be paid.[5] The Court agrees that the plaintiffs have marshalled very meager evidence tending to prove that death benefits were part of the contract; however, the Court will not engage in making a credibility determination. This is a jury issue, and the motion for directed verdict is denied as to the breach of contract count in the Sawyer complaint.

b. Sally Hasenfus' Claims for Misrepresentation.

To prevail on the intentional misrepresentation claim, a plaintiff must establish the following elements:

> (1) a false statement of fact, (2) known by the defendant to be false at the time it was made, (3) made for the purpose of inducing the plaintiff to act in reliance thereon, (4) action by the plaintiff in reliance on the correctness of the representations, and (5) resulting damage to the plaintiff.

Stowell v. Ted S. Finkel Inv. Services, Inc., 641 F.2d 323, 325 (5th Cir. 1981). To prevail on a claim for negligent misrepresentation, a plaintiff must establish the same elements above with one slight modification. With respect to the second element, the plaintiff need only show that the defendant negligently failed to ascertain the truth or falsity of the representation. See Emerson Electric Co. v. Farmer, 427 F.2d 1082 (5th Cir. 1970).

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[5] The jury could likewise consider Richard Secord's statements as gratuitous comments only. The jury is to determine the meaning of these comments in light of the circumstances and events occurring at the time.

Sally Hasenfus alleges that the defendants, through their agents or joint venturers, made representations to her that they would provide a legal defense fund, and would compensate the Hasenfuses for expenses and damages incurred in connection with Eugene Hasenfus' capture, detention and trial in Nicaragua. She further alleges that representations were made that she should stop efforts to raise a legal defense fund. All the representations are alleged to be false and misleading at the time they were made[6] or made without knowledge of the truth or falsity of the representations.[7]

The same evidence that tends to prove the existence of Sally Hasenfus' oral contract claim, likewise, is supportive of her misrepresentation claim. The jury could infer that the $6,000.00 paid in a brown paper bag to Sally Hasenfus was to go towards the formation of a legal defense fund that was to compensate the Hasenfuses for expenses incurred to obtain the release of Eugene Hasenfus. She also testified that various representations were made to her that she understood to mean that a defense fund would be provided. Although the evidence is weak on this claim, the inferences are enough to create an issue of fact that the jury should determine. Thus, the directed verdict motion is denied as to Sally Hasenfus' misrepresentation claims.

c. The Sawyers' Negligence Claim.

Plaintiffs in count II of the Sawyer complain seek recovery based on negligence. Florida, adhering to the

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[6] This is the third cause of action for Intentional Misrepresentation.

[7] This is the fourth cause of action for Negligent Misrepresentation.

universal formulation, permits recovery if the plaintiff demonstrates (1) that he or she was owed a duty of reasonable care from the defendant, (2) that the duty was breached, (3) that the breach was the actual and proximate cause of the plaintiff's injury, and (4) that the plaintiff sustained damages. E.g., Reinhart v. Seaboard Coast Line R. Co., 422 So. 2d 41 (Fla. Dist. Ct. App. 1982).

The Sawyers' Third Amended Complaint alleges that the defendants owed Wallace B. Sawyer the duty of reasonable care to provide a reasonably safe aircraft with adequate safety equipment; that this breach was the direct and proximate result of plaintiff's injury; and that plaintiffs sustained damages.

After reviewing all the testimony presented in the case in the light most favorable to plaintiffs, the parties opposing the directed verdict motion, the court concludes no reasonable juror could conclude that the alleged failure to provide safe equipment constituted a contributing cause to the crash. There is no evidence that but for the defendants' alleged negligence, the aircraft would not have been shot down. The aircraft in which Wallace B. Sawyer and Eugene Hasenfus were flying on October 5, 1986 was directly hit by an unseen heat-seeking missile. It is undisputed that the missile was the direct and proximate cause of the crash. No evidence whatsoever disputed the testimony of Eugene Hasenfus, the sole survivor of the crash, that the aircraft was fully functional nd operating normally on that very day. Nor is there any evidence that the alleged failure to provide an unspecified defense system or different navigational system was a material and substantial factor in causing Sawyer's death.

By beginning with the analysis of the causation element, the Court assumed for the sake of discussion that plaintiff had been able to prove that the equipment provided to them during the final stages of the resupply operation was deficient in some manner. The evidence was also completely lacking as to any breach which could involve deficiencies or malfunctions in the equipment during the final stages of the operation. In fact, the only evidence relevant as to this point was form Eugene Hasenfus, who testified that the equipment was fully functional and operating normally that day. No evidence of any malfunctions that day or anytime during the final stages of the mission was offered.

Plaintiffs attempted to get around this problem by creating the illusion of malfunctions in the equipment through testimony of the operation and accuracy of the equipment in the earlier stages of the operation. The Court found that the operation of the equipment in the earlier stages of the mission was too remote in time and not relevant to the operation of the equipment in the final stages of the mission. The testimony in this area was limited to the six to eight weeks prior to October 5, 1986, when the crash occurred.

During the trial, plaintiffs presented a variation of their original theory of liability which they allege constitutes culpable conduct on the part of the defendants.[8] The "day versus night" theory as alleged creates liability due to the fact that the aircraft was flying in the day, instead of the

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[8] This "day versus night" theory was advanced for the first time at trial. Through a liberal reading of the Third Amended Complaint, the Court allowed plaintiffs to go forward with this theory at trial.

night. The duty to take special precautions and minimize the risk of harm to Sawyer is alleged to have been breached by forcing Sawyer to make day-time drops, as opposed to the night-time drops. Plaintiffs contend that the poor condition and technologically inferior navigational systems in the aircraft, forced the crew to fly the resupply runs in southern Nicaragua during the daylight hours; they allege that this forced day-time flying caused an increased risk of danger which somehow contributed to the crash on October 5, 1986.

This negligence theory is rejected without much difficulty. Plaintiffs insist that the Court should concentrate only on the safety factor and not take into consideration any other circumstances, such as the efficiency factor. The testimony of John Piowaty[9] was that the day drops in the south were more efficient since it was more difficult in the south to see the drop zones. While the safety of the entire operation is a highly relevant factor in determining whether there is any negligence on the part of the defendants, the key is what is reasonable under the circumstances.

The best determination of what is reasonable under the circumstances of whether the flights in the south should be made in the day or night was undisputedly left up to the crew. The people recruited to participate in this mission

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[9] John Piowaty was a crew member participating in the covert operation during the relevant time period. He was a seasoned pilot in this type of mission and had first hand knowledge of the problems associated with the drops that were being made in the south of Nicaragua. Mr. Piowaty, an expert in the various navigational systems discussed during the trial, described the basic operation of each system including the pros and cons associated with the use of each type of navigational system.

were not commercial pilots; they were pilots with experience in combat type missions. For this "day versus night" theory to hold, plaintiffs would have to establish that Sawyer somehow was forced to make the day flights, and that Sawyer and the other crew members preferred the night flights since they were more safe. The undisputed testimony by John Piowaty at trial was that the crew made the decision as to when to fly on the resupply missions. Mr. John Piowaty also testified there were dense jungles and rivers in southern Nicaragua, making dead reckoning[10] necessary to reach the drop zones, and that the decision to fly during the day was made only by the crew members.

Without any supportive evidence, plaintiffs claim that if the plane had been equipped with an Inertial Navigational System[11] ("INS"), the crew would have opted to fly at night, creating less likelihood of being shot down by a heat-seeking missile. In fact, the evidence in this case has been that even with an INS the plane could still have the same chance of being shot down by the heat-seeking missile. The "flame signature" from the plane's engine could be more readily seen at night; a ground missile operator could lock on this "flame signature" hitting the plane with 95% or greater rate of accuracy. The evidence is undisputed that the decision to make the drops during the

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[10] Dead reckoning is a technique by which the crew could calculate their course and find the drop zones to get the supplies to the Contra forces.

[11] This type of system relies solely on an internal navigational tracking system. In the simplest terms, the system is set at the beginning of the flight with the correct location coordinates of where the aircraft is positioned and continues to calculate an approximate location depending on the direction, seed and distance traveled.

day were made by the crew only. Moreover, absent in the record is any evidence that had the aircraft been equipped with an INS the drops in southern Nicaragua would have been made in the night or even that flying in the night would have been safer.

Finally, even giving plaintiffs the presumption that some type of breach of duty occurred, the causation element cannot be proved. Taking the evidence in the light most favorable to the plaintiffs, allowing every reasonable inference possible, no reasonable jury could find that any alleged breach on the part of the defendants was causally related to the crash which occurred when the aircraft was hit by an unseen heat-seeking missile on October 5, 1986.

d. The Sawyers' Misrepresentation Claims

The Sawyers' misrepresentation claims ar count III and IV of their Third Amended Complaint. To prevail on these claims plaintiff must prove the elements as set forth in section b. above. These claims do not withstand the directed verdict motions because there was no evidence of any knowingly or negligently false statements of material facts upon which Wallace B. Sawyer justifiably relied and which caused his death or other damages. Royal Typewriter Co. v. Xerographic Supplies Corp., 719 F.2d 1092, 1103 (11th Cir. 1983) (applying Florida law on misrepresentation). Plaintiffs allege that representations were made that safety equipment or repair of the planes could not be provided due to the lack of money provided to run the operation.

No evidence supported the claim that any of the above statements were made to Sawyer or that Sawyer relied on the statements resulting in damage to Sawyer.

Clearly, plaintiffs have not adduced sufficient evidence to show that the alleged misrepresentations were actionable. The motion for directed verdict must be granted as to Sawyers' misrepresentation claims.

e. Eugene Hasenfus' Conversion Claim

To establish a tort of conversion, the evidence must reveal that the jury will be able to conclude reasonably that the defendants, through their agents or joint venturers, committed a "wrongful exercise or assumption of authority" over Eugene Hasenfus' personal papers. See Star Fruit Co. v. Eagle Lake Growers, 33 So. 2d 858, 860 (Fla. 1948). In other words, to find liability on the conversion theory there must be evidence of wrongful deprivation of identifiable property for an indefinite period of time. 12 Fla.Jur.2d, Conversion and Replevin section 6 (1979).

Applying these principles to the facts presented in this case, it is clear that no reasonable jury could find for plaintiffs on the conversion count. Paragraph 55 of the Hasenfus' Third Amended Complaint states that:

> 55. Plaintiffs are informed and believe and based thereon allege that following Hasenfus' capture in Nicaragua, defendants took possession of the personal papers and effects of Hasenfus and destroyed some of them in order to cover up various aspects of the Contra re-supply operation and defendants' participation therein. Defendant Southern Air then sent the remaining "sanitized" papers and effects of Hasenfus to his home in Wisconsin.

The property allegedly destroyed or withheld from plaintiffs was not specifically identified in the complaint. In any event, there was no evidence of any wrongful deprivation of property or wrongful assumption of authority. The testimony was that Eugene Hasenfus' camera, personal papers[12] and an unspecified amount of cash was somehow taken and never returned to plaintiffs. The plaintiffs' allegations are unsupported and purely conclusory. The Court is not challenging the credibility of Eugene Hasenfus' testimony that these items are missing; however, the door is not wide open for plaintiffs to impose liability on these defendants absent sufficient evidence to create a jury issue on the conversion count.

III.

CONCLUSION

For the foregoing reasons, the defendants' motion for directed verdict is GRANTED IN PART and DENIED IN PART. The plaintiffs will be permitted to seek to impose vicarious liability on the joint venture theory and agency theory. The Hasenfuses will be permitted to go forward with Count I, II, III and IV of their Third Amended Complaint. Kasanee Sawyer's will be permitted to go forward only with Count I, the breach of contract claim, set forth in her Third Amended Complaint.

DONE AND ORDERED at Miami, Florida, this 10th day of September, 1990.

[Signed by Clyde Atkins]
SENIOR UNITED STATES DISTRICT JUDGE

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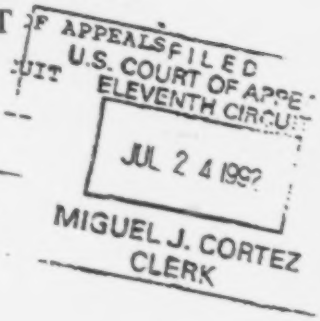
[12] The personal papers include ticket stubs and other bits of paper that belonged to plaintiff Eugene Hasenfus.

O-3-1

OPINION 3

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT



RE: 91-5106

EUGENE HASENFUS and
SALLY HASENFUS,

Plaintiffs-Appellants,

versus

RICHARD SECORD, an individual,
CORPORATE AIR SERVICES, a
Pennsylvania corporation;
SOUTHERN AIR TRANSPORT, a
Florida corporation;
ALBERT HAKIM, an individual,

Defendants-Appellees.

RE: 91-5107

KASANEE SAWYER, an individual,
KASANEE SAWYER, Administrix
of SAWYER, WALLACE B., Deceased,

Plaintiffs-Appellants,

versus

O-3-2

RICHARD SECORD, an individual,
CORPORATE AIR SERVICES, SOUTHERN
AIR TRANSPORT, a Florida corporation,
ALBERT HAKIM, an individual, et al.,
Defendants-Appellees.

On Appeal from the United States District Court for the
Southern District of Florida

BEFORE: HATCHETT, Circuit Judge, JOHNSON and HENDERSON, Senior Circuit Judges.

PER CURIAM:

The petition for rehearing filed by appellants, Eugene Hasenfus, Sally Hasenfus and Kasanee Sawyer is denied.

Denied.

ENTERED FOR THE COURT:

...E COURT:

UNITED STATES CIRCUIT JUDGE

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11852 Santa Monica Boulevard, Suite 3, Los Angeles, California 90025; that on October 22, 1992, I served the within *Petition For Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(By Express Mail: Original and Forty Copies)

Robert M. Beckman, Esquire
Beckman & Kirstein
2445 "M" Street, N.W.
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Michael A. Pasano, Esquire
Zuckerman, Spaeder, Taylor & Evans
201 South Biscayne Boulevard
Suite 900
Miami, Florida 33131

Clerk, U.S. Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 22, 1992, at Los Angeles, California.

Betty J. Malloy
(*Original Signed*)

(2)

No. 92-771

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

EUGENE HASENFUS and KASANEE SAWYER,
Petitioners,

v.

RICHARD SECORD and SOUTHERN AIR TRANSPORT,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF IN OPPOSITION OF RESPONDENT RICHARD SECORD

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QUESTION PRESENTED

Whether the Petition presents error properly reviewable by this Court?

PARTIES TO THE PROCEEDING

The parties to this proceeding are the Petitioners Eugene Hasenfus and Kasanee Sawyer and the Respondents Richard Secord and Southern Air Transport. Three other parties named in the complaints, Plaintiff Sally Hasenfus and Defendants Corporate Air Services and Albert Hakim, are not involved in this petition for certiorari.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-771

EUGENE HASENFUS and KASANEE SAWYER,
Petitioners,

v.

RICHARD SECORD and SOUTHERN AIR TRANSPORT,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF IN OPPOSITION OF RESPONDENT RICHARD SECORD

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 962 F.2d 1556.

JURISDICTION

The jurisdiction of this Court to review the opinion of the Eleventh Circuit was invoked under 28 U.S.C. § 1254(1). Respondent Secord contends that this Court has no jurisdiction since the Petition was not timely filed by a then member of the Bar of this Court. (See Brief of Respondent Southern Air Transport).

STATEMENT OF THE CASE

A. Nature of the Case.

This case arises out of the participation of Eugene Hasenfus and Wallace B. Sawyer, Jr., and others in an airlift operation engaged in the delivery of weapons and supplies to the Nicaraguan "Contras" (combatants in a civil war in Nicaragua) in 1986. During one of these airlifts, on October 5, 1986, an aircraft which Mr. Sawyer was flying and on which Mr. Hasenfus was working, was shot down over Nicaragua by a Sandinista surface-to-air missile. Mr. Sawyer, along with two others, was killed. Mr. Hasenfus was able to parachute from the aircraft before it crashed and was later captured, tried and (three months later) released by Nicaraguan forces. Petitioner Kasanee Sawyer is the administratrix of the Estate of Wallace B. Sawyer.

B. The Facts.

In 1985 the White House, together with Central Intelligence Agency Director, William Casey, developed the concept of a "bridging operation" during a period of Congressional ban of CIA aid to the Nicaraguan "Contras." The CIA was prepared to resume its covert role after the ban was repealed. Retired Air Force General Richard Secord, then a private citizen, had been initially recruited to supervise an operation known as the "Iran Initiative." In the summer of 1985, he was also requested to organize the Nicaraguan Resistance air supply operation until the CIA could take it over. This "takeover", which was expected imminently, ultimately stretched out for over nine months.

Secord recruited Richard Gadd, with whom he had previously worked, to develop an air resupply operation. Gadd met with, and proposed a plan to Secord, White House officials and the Central Intelligence Agency. Gadd then recruited Edward Garay, who owned a company

known as Corporate Air Services. All the pilots, maintenance personnel and supply specialists including Eugene Hasenfus were seasoned combat veterans with great experience in military operations. All were private citizens. Southern Air Transport, Inc., a Miami-based company, was utilized by contract for some repair and maintenance procedures on aircraft purchased by the private resupply group.

Wallace B. Sawyer and Eugene Hasenfus were hired by Corporate Air Services as independent contractors. They both signed written contracts. Sawyer was an experienced combat pilot and Eugene Hasenfus was an experienced combat supply drop specialist ("kicker"). They were stationed in a Contra air base at Ilopango, El Salvador. During the early days of October, 1986, a mission was planned to drop military supplies to the Southern Front inside Nicaragua near the Costa Rican border.

The mission planned for October 5, 1986, was a dangerous one. During planning sessions with the Contra military leader, Colonel Enrique Bermudez, the flight plan and drop zone targeted in Southern Nicaragua were carefully discussed by the crew, including the pilot William Cooper. U.S. Military advisors provided the pilots with intelligence and satellite information. On October 5, 1986, with the plane functioning perfectly, the mission began.

The events are best described by the sole survivor Petitioner, Hasenfus:

> A It was just about 12:40. The reason why I can state this very clearly, because I'll never forget it, is: We were flying on our northwestern approach into our target. I was in the back of the aircraft, standing in this open door, the door that was taken off, I was standing, hanging onto part of the structural part of the aircraft; and I was also observing where we were at. In other words, I was looking out. Any main ter-

rain features, I would talk with Buzz Sawyer over the intercom; and he would double-check it on his map. Buzz Sawyer at the same time was checking his Omega; and he was also checking his Loran, which was giving him—us time and distance from our target.

Q Did you gain an impression as to what type of man Buzz Sawyer was when you were down in Nicaragua?

A Yes, I did. Buzz Sawyer was a pilot's pilot. He was an individual that everybody looked up to and respected.

Q As you were flying over the jungle at about noon, can you describe what happened.

A Yes. As we were coming into our—on our northwest heading coming into our coordinates, our Loran was locked in. We were coming in. He was—Buzz Sawyer was reading out the time and distance to the target, because I remember very vividly him saying, "Well, we're about four minutes out. We're about three minutes out."

And everything was coordinated. Our map that he was looking at in his lap and also when I was looking out the door, seeing this river was here coming in between these points, verified everything. At the same exact time, the Nicaraguan freedom fighter that was on board was in communications with this FDN team that was on the ground and needed support; and he had direct communications and was talking with them.

Q And then what happened?

A Well, I remember, because he said, "We're just"—I looked at my watch, and it was 12:40 exactly. And it was just, oh, a matter of seconds after that. There was a loud explosion form the right. I was astonished. I looked. The whole aircraft was on fire. Buzz Sawyer came over the intercom, and his last words to me was "What happened?" I said, "Oh we took a hit," and that's the last words I said.

The aircraft had been shot down by a surface-to-air missile, fired from the jungle floor as the plane flew over.

Wallace B. Sawyer, William Cooper and the Contra military advisor on board were killed. Hasenfus was captured and charged with terrorism, violation of Nicaraguan air space and other similar crimes by the Nicaraguan government. He was tried and convicted. Three months later he was released. He was assisted without charge by various persons, including U.S. Senator Chris Dodd, former Attorney General Griffin Bell, and others.

Petitioners first filed suit in a California State Court, and then in the Federal District Court for the District of Columbia seeking many millions of dollars in damages based upon various theories of negligence, emotional distress, and breach of contract. Those suits were dismissed. This suit, based upon similar theories was filed in the Southern District of Florida.

C. Course of Proceedings.

The Third Amended Complaint for Damages filed by Eugene Hasenfus and Sally Hasenfus and upon which the case was tried, purported to state claims for breach of written contract, breach of oral contract, intentional misrepresentation, negligent misrepresentation, and conversion.[1] The Third Amended Complaint for Damages filed by Kasanee Sawyer and upon which the case was tried, purported to state claims for breach of contract, negligence, intentional misrepresentation, negligent misrepresentation, and wrongful death. The total amount of damages sought in both cases was in excess of $10,000,000. The named Defendants in both cases were Richard Secord, Corporate Air Services, a Pennsylvania corporation, Southern Air Transport, Inc., a Florida corporation, and Albert Hakim.[2]

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[1] Notwithstanding numerous pretrial orders, the Plaintiffs were continually changing their various theories of negligence, contract and employment, during the trial. That process continues in this Petition.

[2] Services of process was never obtained upon Defendants, Corporate Air Services and Albert Hakim and these Defendants were dismissed by the District Court.

Richard Secord was not alleged to have personally done anything to harm or damage any of the Petitioners. All of the relief requested against Secord was based upon vicarious liability theories of joint venture or agency.[3]

The thrust of Petitioners' claims was that the airlift operation for which Hasenfus and Sawyer worked was a joint venture comprised of Respondents Southern Air Transport, Inc. and Richard Secord, among possible others. The Petitioners alleged that both Mr. Hasenfus and Mr. Sawyer were recruited to work for the organization by Mr. William Cooper, acting as an agent of the alleged joint venture. At various times during the trial, Petitioners claimed that they were employees. At other times, they disavowed this status.[4]

Petitioners' claims were tried before a jury beginning July 25, 1990 and concluding, after deliberations on August 27, 1990. On August 27, 1990. On August 17, 1990, the court orally announced its Order Granting in Part and Denying in Part the Respondents' Motions for Directed Verdict, and thereafter on September 10, 1990, entered a Supplemental Order Granting in Part and Denying in Part Respondents' Motion for Directed Verdict.[5] As a result of those orders, the claims considered by the jury were Eugene Hasenfus' claim for breach of written contract, Sally Hasenfus' claims for breach of oral contract, intentional misrepresentation and negligent misrepresentation, and Kasanee Sawyer's claim for breach

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[3] In the trial court's July 24, 1990 Order on Motions for Summary Judgment, the Court rejected two other vicarious liability theories, those of civil conspiracy and of alter ego, involving Defendant Corporate Air Services, Ltd.

[4] The Petitioners were not themselves sure of their position, since, if they were employees, they would be barred from suit under the Florida Workers' Compensation Act. The court agreed. Petitioners never decided which position to take.

[5] Motions for Directed Verdicts were filed by both Richard Secord and Southern Air Transport, Inc., as to both sets of Petitioners.

of contract. After deliberations, the jury found that a joint venture existed between the Respondents and that William Cooper (the pilot of the fatal aircraft) was the agent of the joint venture. However, the jury found no breach of any contract, no misrepresentation, and no damages. Judgment was entered for Respondents accordingly.

REASONS FOR DENYING THE WRIT

THE PETITION PRESENTS NO ERROR PROPERLY REVIEWABLE BY THIS COURT.

A. No Basis for the Invocation of this Court's Discretionary Jurisdiction Has Been Made Out.

Petitioners claim as the sole basis for their Petition for review by this Court that the Court of Appeals denied them due process of law and improvidently affirmed the District Court's denial to them of due process of law.

Due process of law as guaranteed by the United States Constitution requires notice and a fair opportunity to be heard. Indeed, as this Court stated in *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 1493 (1985):

> An essential principle of due proces is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 656 (1950).

These rights were afforded to and fully exercised by Petitioners. They proceeded to trial based upon the multifarious counts and changing theories of their Complaint. A jury of their choice was picked. They presented evidence consistent with applicable law over a three week trial period. The jury was carefully in-

structed and deliberated Petitioners' case over almost five (5) days. Every conceivable procedural safeguard was afforded them. The trial judge indulged every reasonable view of Petitioners favorable to their case, even when they violated much of his Pre-Trial Order.

After Petitioners lost they perfected an appeal. The Court of Appeals had the case for over eighteen (18) months, carefully reviewing over 3000 pages of trial testimony, exhibits, and numerous briefs and oral arguments. The Court of Appeals reviewed the direct verdict *de novo*. See 962 F.2d 1556 at 1559.

Due Process of Law does not require that Petitioners win, which is obviously their understanding of the term. No authority or even basis for the alleged violation of that concept has been advanced by Petitioners. Moreover, Petitioners' new constitutional theory was not even raised in the Court of Appeals.

This court has traditionally not accepted cases except:

> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court. U.S. Sup. Ct. Rule 17, 28 U.S.C.A.

This case is not one which falls in any of the above categories. While couched in "due process" terms, Petitioners simply argue their interpretation of the facts and allege that the Court of Appeals, like the jury and District Court failed to perceive the alleged brilliance of Petitioners' legal and factual arguments. They simply want another hearing by this Court. Traditionally, the Court has declined these invitations. *Magnum Import Co. v. Coty*, 262 U.S. 159, 43 S.Ct. 531 (1923). *Ross v. Moffitt*, 417 U.S. 600, 616-17, 94 S. Ct. 2437, 2447 (1974).

This Court emphatically stated its position in this area in *General Talking P. Corp. v. Western Electric Co.*, 304 U.S. 175, 58 S.Ct. 849, *adhered to*, 305 U.S. 124, 59 S.Ct. 116 (1938), *reh'g denied*, 305 U.S. 675, 59 S.Ct. 355 (1939). *General Talking* was a patent case in which the issues of acquiescence and estoppel were based on questions of fact. The Court stated the following:

> There is nothing in the lower courts' decision on either of the added questions to warrant review here. Whether respondents acquiesced in the infringement and are estopped depends upon the facts. Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it. *Southern Power Co. v. N.C. Public Service Co.*, 263 U.S. 508. *United States v. Johnston*, 268 U.S. 220, 227. Moreover, the decision on that point rests on concurrent findings. They are not to be disturbed unless plainly without support. *United States v. Chemical Foundation*, 272 U.S. 1, 14.

Id. at 178.

B. No Basis of Error of Either the Court of Appeals or the District Court Has Been Made Out.

The District Court properly precluded the jury from considering any issue of negligence against Respondents. The Court of Appeals had ample precedent to affirm that decision. See *Stahl v. Metropolitan Dade County*, 438

So.2d 14 (Fla. 3d DCA 1983); *Restatement (Second) of Torts* § 430; *C&B Airways Co. v. Ashurst*, 369 So.2d 631 (Fla. 3d DCA 1979); *Leversen v. Boeing Company*, 510 F.2d 937 (9th Cir. 1975).

In order to prove negligence, Petitioner Sawyer was required to demonstrate that the Respondents owed him a particular duty of care, the breach of which proximately caused damage to him. There was no evidence that any act or omission by the Respondents caused the fatal crash on October 5, 1986. Indeed, the evidence was uncontroverted that the crash was caused by a Sandinista missile and not by the alleged failure to properly equip the aircraft or by any decision on the part of the pilots (Mr. Sawyer and Mr. Cooper) to fly during the day, instead of night, in Southern Nicaragua. See *Gooding v. University Hospital Bldg. Inc.*, 445 So.2d 1015, 1018 (Fla. 1984). Moreover, the trial court could properly have found that Respondent Sawyer knowingly and intentionally assumed the risk of his own death by flying the October 5, 1986 mission. *See, e.g., Ashcraft v. Calder Race Course*, 492 So.2d 1309 (Fla. 1986) [jockey riding horse at race course assumes risks inherent in the sport of horse racing]; *Kuehner v. Greene*, 436 So.2d 78 (Fla. 1983) [participant injured in a karate match]; *Babine v. Gulley's Bronco Shop*, 499 So.2d 176 (Fla. 1st DCA 1986) [plaintiff injured while riding a mechanical bull]; *Black v. District Bd. of Trustees*, 491 So.2d 303 (Fla. 4th DCA 1986) [plaintiff injured in a police academy exercise].

The District Court properly instructed the jury as to Eugene Hasenfus' breach of contract claims. The Petitioners demonstrated no error to the Court of Appeals. *See, e.g. Bornmann v. Great Southwest General Hospital, Inc.*, 453 F.2d 616, 624 (5th Cir. 1971). The trial court properly determined that there was only one written agreement for Mr. Hasenfus' employment, and the testimony indicated that there may have been other oral terms which the parties may have honored. The evidence

of the nature and extent of those terms was not clear but the trial court, in its instructions and in its special verdict interrogatory forms made clear that the jury could find such oral terms. The Jury found none. Accordingly, the District Court committed no harmful or prejudicial error. *See, e.g., Pate v. Seaboard R.R., Inc.*, 819 F.2d 1074 (11th Cir. 1987).

Moreover, the District Court properly ruled and correctly instructed the jury that the Hasenfus employment agreement, if it was found to exist, terminated on October 5, 1986, based upon Mr. Hasenfus' inability to perform. He admitted that he knew capture was a possibility of flying over a combat zone. See *Crown Ice Machine Leasing Co. v. Sam Senter Farms, Inc.*, 174 So.2d 614, 617 (Fla. 2d DCA 1965). Finally, there was no evidence of any agreement that Mr. Hasenfus would be paid if he could not perform and there was certainly no basis upon which to find that the Respondents did anything to cause Mr. Hasenfus' inability to perform.

CONCLUSION

For the foregoing reasons, the Petition of Eugene Hasenfus and Kasanee Sawyer should be denied.

Respectfully submitted,

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Dated: November 25, 1992

(3)

Supreme Court, U.S.
FILED
DEC 2 1992
OFFICE OF THE CLERK

NO.: 92-771

In The

Supreme Court of the United States

October Term, 1992

Eugene Hasenfus and Kasanee Sawyer,

Petitioners,

v.

Richard Secord and Southern Air Transport,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT SOUTHERN AIR TRANSPORT, INC. IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

In addition to the questions presented by Petitioner, the following question is presented:

1. Whether this Court has jurisdiction of a petition for certiorari that was received 91 days after the entry of the judgment below, was not sent to the Clerk by first-class mail, and was not placed on the docket for an additional 10 days after its receipt because Petitioner's counsel was not a member of the Bar of this Court?

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NO.: 92-771

In The

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Eugene Hasenfus and Kasanee Sawyer,

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Richard Secord and Southern Air Transport,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT SOUTHERN AIR TRANSPORT, INC. IN OPPOSITION TO PETITION FOR CERTIORARI

Respondent Southern Air Transport, Inc.,[1] respectfully submits that, for the following reasons, the case should not be reviewed by this Court: (a) The Court lacks jurisdiction because the Petition for Writ of Certiorari was not timely filed; (b) Petitioners' questions were not presented to the court below; (c) Petitioners merely seek another bite at the apple; there are no special and important reasons for review; and (d) The courts below correctly applied the applicable rules of negligence and contract termination.

JURISDICTION

The writ of certiorari was not applied for within the 90 days after entry of judgment mandated by 28 U.S.C. § 2101(c) (1988). The 90-day limit is jurisdictional. This

[1] Southern Air Transport has no parent or subsidiary company to be listed.

Court lacks authority to extend the period for filing except as Congress permits. *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990).

The petition met none of the conditions set out in the Court's Rules to be timely filed: it was not received by the Clerk until the 91st day after entry of judgment below; it was not sent to the Clerk by first-class mail; it was not filed by a prisoner.

OPINIONS BELOW

Petitioners' appendix does not include the opinion of the district court of January 7, 1991, setting forth the district court's reasons for instructing the jury that Hasenfus' contract terminated on October 5, 1986, the day his plane was shot down. It is reprinted in the Appendix hereto.

STATEMENT OF THE CASE

For the purpose of determining whether there are special and important reasons for granting the petition, the material facts are set forth in the opinions of the district court and the court of appeals printed in the Appendices to the petition supplemented by the opinion printed in the Appendix to this opposition.

The facts relating to the jurisdiction of this Court are as follows: On October 22, 1992, the day the petition was required to be filed with the Clerk of the Court, Petitioners delivered the petition to express mail, which is not first-class mail and which competes with private delivery services. The petition was received by the Clerk on October 23, 1992, 91 days after entry of judgment. However, the Clerk did not treat the petition as ready to be docketed on that day because Petitioner's counsel, Brian R. Strange, was not a member of the Bar of this Court. Mr. Strange applied to become a member. Respondent Southern Air Transport understands that the Clerk held the petition and did not file the petition

and docket the case until some time around November 2, 1992, after Mr. Strange became a member of the Court's Bar.

REASONS FOR DENYING THE WRIT

I.
THIS COURT LACKS JURISDICTION DUE TO LATE-FILING

The Petition for Writ of Certiorari was sent by express mail on October 22, 1992, to the Clerk, United States Supreme Court. The Petition was received on October 23, 1992, one day more than the 90 days permitted by 28 U.S.C. § 2101(c) (1988). No extension had been requested or granted.

The Court lacks jurisdiction because the petition was not received by the Clerk within 90 days and because it was not "sent to the Clerk by first-class mail" which Supreme Court Rule 29.2 says can constitute being "timely filed". The petition was delivered by "express mail". Express mail is a different class of service from first-class mail. It is more than twice as expensive and is intended to compete with private delivery services such as UPS or Federal Express. See United States Postal Service, Domestic Mail Manual Ch. 2 (express mail) and Ch. 3 (first class mail) (Issue 44, 9/20/92); 39 C.F.R. § 320.6 (urgent delivery exception).

This Court's jurisdiction to grant a writ of certiorari requires that it be "applied for within ninety days after the entry of such judgment or decree." 28 U.S.C. § 2101(c) (1988). The Court has recently explained,

> Title 28 U.S.C. § 2101(c) requires that a petition for certiorari in a civil case be filed within 90 days of the entry of the judgment below. This 90-day limit is mandatory and jurisdictional. We have no authority to extend the period for filing except as Congress permits. Unless the State's petition was filed within 90 days of the

entry of the Court of Appeals' judgment, we must dismiss the petition.

Missouri v. Jenkins, 495 U.S. 33, 45 (1990).

Supreme Court Rule 13.1 provides that a petition for a writ of certiorari "shall be deemed in time when it is filed with the Clerk of this Court within 90 days after the entry of the judgment." "Filing deadlines, like statutes of limitations, necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them." *United States v. Locke*, 471 U.S. 84, 101 (1985) (filing statutorily required documents one day late results in loss of mining claim). Supreme Court Rule 13.3 provides: "The Clerk will refuse any petition for a writ of certiorari which is jurisdictionally out of time." *See also United States v. Lombardo*, 241 U.S. 73, 76 (1916) (filing is not complete until the document is delivered to the office and received, not sent through the United States mail); *Matter of Bad Bubba Racing Products, Inc.*, 609 F.2d 815, 816 (5th Cir. 1980) (notice of appeal that is mailed within the time for appeal is "not equivalent to filing it" if it is not received and filed within ten days). *Compare, Houston v. Lack*, 487 U.S. 266, 276 (1988) (in the unique circumstances of a *pro se* prisoner who deposited a notice of appeal with the prison authorities 27 days after judgment, and the record does not show when the district court actually received it although it was stamped "filed" 31 days after judgment, *i.e.*, after the expiration of the 30-day filing period, was held to have been "filed" within the meaning of the statute on the day that the notice was delivered to prison officials for forwarding to the clerk of the court).[2]

The methods for timely filing are set forth in the 1990 revision of Rule 29.2. The 1990 revision makes clear that this Court intended only first-class and not express mail to be an

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[2] Four justices dissented saying the majority's rule was a good one but should be adopted by amendment of the Rules. This was done in the 1990 revisions of the Supreme Court Rules. *See* Sup. Ct. R. 29.2.

acceptable alternative to actual receipt by the clerk. Before 1990, the applicable rule, Rule 28.2, read,

> 2. To be timely filed, a document must be received by the Clerk within the time specified for filing, except that any document shall be deemed timely filed if it has been deposited in a United States post office or mailbox, with first-class postage prepaid.

Sup. Ct. R. 28.2, 28 U.S.C.A. Rules (1984).

The 1990 revision put the timely filed requirements in new Rule 29.2 and made significant changes to clarify that only first-class mail would constitute timely filing.

> 2. To be timely filed, a document must actually be received by the Clerk within the time specified for filing; or be sent to the Clerk by first-class mail, postage prepaid.

Sup. Ct. R. 29.2.

The Court's statement that a document must be sent "by first-class mail" is a clear indication of intent. It is familiar law that exceptions should be narrowly construed. New Rule 29.2 modified the 1980 innovation of timely filing of documents by U.S. mail and states that the U.S. mail service that can be used is confined to "first-class mail". Robert L. Stern, Eugene Gressman and Stephen M. Shapiro, *Supreme Court Rules, The 1990 Revisions* 3-4 (1990).

The Court's specific and carefully crafted revised rules on filing are not subject to further functional equivalency analysis. The Court anticipated, and negated, any argument of equivalency to first-class mail when, in the 1990 revisions to its Rules, it added as the last sentence to Rule 29.2 that "a private delivery or courier service" (obviously superior to first-class mail) was not within the first-class mail exception. *See Lindemood v. Commissioner of Internal Revenue*, 566 F.2d 646, 649 (9th Cir. 1977) (regulations stating explicitly what constitutes "timely filed" leave "no room for exceptions or judicial interpretation").

There are no unique circumstances (*e.g.*, *pro se* prisoner) to invoke any consideration of equity. Moreover, an equitable functional equivalency analysis is inappropriate because there would be no bright-line rule. In *Houston v. Lack*, the Court confirmed the general rule but made an exception for delivery to prison authorities. 487 U.S. at 274. Because reference to the prison mail log "will generally be a straightforward inquiry," it created a "bright-line rule, not an uncertain one." *Id.* at 275. Accepting express mail for first-class mail creates no bright-line rule because it leaves open every type of delivery other than private delivery or courier service.

In this case, even considering express mail as equivalent to first-class mail does not establish jurisdiction. The petition in this case was not capable of being accepted for filing on the day it was received by express mail (October 23rd), because Petitioner's counsel of record, Mr. Strange, was not a member of the Bar of this Court. *See* Sup. Ct. R. 12.1.

This is no *pro se* petitioner. Mr. Strange is an experienced advocate who could have and should have dispatched the petition in time to have it received by the 90th day. Mr. Strange could have and should have had the petition signed by a member of the Bar of this Court. There was no impediment to compliance with the Court's rules as written. Accepting this petition undermines the integrity of the rules.

II.
PETITIONERS' QUESTIONS WERE NOT ARGUED BELOW

Petitioners did not raise below the due process claims they present in their petition. Petitioners argued and reargued below that the district court and the court of appeals erred in applying Florida tort and contract law to the facts. Their petition here raises, for the first time, the claims that their due process rights were violated by (1) the district court's directed

verdict on and the court of appeals' affirmance of Sawyer's negligence claim and (2) the district court's jury instruction on and the court of appeals' affirmance of the instruction on Hasenfus' contract claim.[3]

This Court's standard for granting certiorari is that "we will not review a question not pressed or passed on by the courts below." *City of Springfield v. Kibbe*, 480 U.S. 257, 266 (1987). *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38 (1989); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 277 (1989).

III.
THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR REVIEW

There is no conflict among the circuits, no federal question. Only Petitioners are affected; they do not claim that anyone else is affected by the decision below, or that the decision below involves principles of importance to the public. This Court consistently denies writs of certiorari in such circumstances. *See Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 77-80 (1955), citing *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

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[3] In their Petition for Writ of Certiorari at pp. 6-7, Petitioners note that they raised as errors in their petition for rehearing to the court of appeals the issues which Petitioners here present for the first time as due process violations.

IV.
ONLY QUESTIONS OF EVIDENCE AND FACTUAL FINDINGS WHICH WERE CORRECTLY DECIDED BELOW ARE INVOLVED

Petitioners ask the Court to review the evidence and inferences drawn from the evidence. This was done by the district court and, *de novo*, by the court of appeals. Granting of the writ for this purpose is not warranted. It is contrary to the Court's long-standing principles applied to evaluating certiorari petitions. *See General Pictures Co. v. Western Electric Co.*, 304 U.S. 175, 178 (1938).

Petitioners' fly specking of the court of appeals' discussion of the evidence contained in the 3,600 page trial transcript in this case falls far short of demonstrating that the appellate court "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Sup. Ct. R. 10.1(a). "[J]urisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923); *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts"). When, as in the instant case, the appeals court is affirming the district court, this Court has often held that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949), *aff'd*, 339 U.S. 605 (1950); *Rogers v. Lodge*, 458 U.S. 613, 623, *reh'g denied*, 459 U.S. 899 (1982).

Petitioners' argument has nothing to do with any denial of due process by the courts below. The substance of Petitioners' complaint about the directed verdict and its affirmance is

first, that the court of appeals "overlooked" Hasenfus' testimony that it "was much safer to fly in the night" and "misconstrued" a sentence of Wilburn's testimony. Pet. at 12-15. Second, Petitioners contend that the aircraft was at 3,000 feet when it was hit by the heat-seeking missile and not at 500 to 800 feet. Pet. at 9-11. If Petitioners contentions were correct (and they are not), these are not due process issues. They are surely not very obvious and exceptional showings of error. Review would not be warranted. *See General Pictures Co. v. Western Electric Co.*, 304 U.S. 175 (1938). Moreover, none of the alleged errors alone or combined even relates to the material facts upon which both the lower courts based their conclusions.

In affirming the district court's grant of a directed verdict on negligence, the court of appeals applied the tests set forth in *Carter v. City of Miami*, 870 F.2d 578, 581 (11th Cir. 1989) (a mere scintilla of evidence is not sufficient to defeat a motion for directed verdict) and *Gooding v. University Hospital Bldg., Inc.*, 445 So.2d 1015, 1018 (Fla. 1984) (the trial court is required to direct a verdict for the defendants when there is no more than a mere possibility of causation). Petitioners do not seek review of those principles which control the instant case. The court of appeals stated:

> Viewing this evidence in its entirety, we agree with the district court that appellants did not introduce substantial evidence that the absence of an inertial navigation system proximately caused Sawyer's death. The testimony of Baker and Wilburn raises the possibility that equipping the plane with an INS would have prevented it from being shot down. But Baker and Wilburn's other statements, and the consistent testimony of the other witnesses, showed that equipping the plane with an INS probably would not have reduced the risk posed by surface-to-air missiles. Because appellants' case raised no more than a possibility that appellees' negligence was the proximate cause of their injury, the district court was

obligated to direct a verdict for appellees. *Gooding*, 445 So.2d at 1018.

Hasenfus v. Secord, 962 F.2d 1556, 1561 (11th Cir. 1992).

Petitioners' assertions of alleged flaws in the court of appeals' fact analysis of the directed verdict are not correct. The Petitioners' assertion that it was "much safer" to fly at night is a rehash of the argument they made at least twice to each of the two lower courts. Pet. at 12-17. The Hasenfus testimony which Petitioners now says is critical (Pet. at 14-15), garnered less than two sentences in petitioners' opening brief to the court of appeals and no reference in their reply brief.[4] As for the Wilburn testimony (Pet. at 12-14), the court of appeals specifically considered that testimony in light of all the other testimony and concluded that Wilburn's testimony did not create a triable issue of negligence because there was no evidence of unreasonable conduct.[5] *See* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 31, at 170 (5th Ed. 1984).

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[4] Given that the other witnesses were experienced combat pilots, one of whom, the chief pilot, had over 5000 hours experience with the aircraft on similar missions, it is not surprising that Petitioners like the courts below, did not consider Hasenfus' testimony significant.

[5] The Petitioners' argument that the court of appeals improperly weighed the evidence is frivolous. Pet. at 15-17. The court below applied the proper standard which required it to look at all the evidence. The court of appeals as well as the district court drew every reasonable and logical inference in favor of Petitioners. The Petitioners mischaracterize both the appellate court's analysis and the evidence. Wilburn left in June and was never involved in considering whether flights would be performed at night. Wilburn never testified that the missions could be successfully performed at night. Hasenfus specifically testified that he did not participate in the decision about when to fly and did not know the reasons for the decision. [R. 22-421-182-83]. As the court of appeals specifically noted, Baker testified that the planes had to descend to 400 feet. There was no evidence this could be done safely at night. The uncontradicted testimony of all the pilots was that none of them considered it safe to fly low at night in mountainous jungle terrain.

The court of appeals noted correctly that all the pilots testified that to complete the missions in the south it was necessary to come down to 400 to 800 feet which exposed the aircraft to missile, anti-aircraft, and small arms fire day or night. Given this reality, the danger of flying low over the jungle at night, the greater opportunities for evasive maneuvers in daylight and the need for precision in dropping the supplies, the pilots considered their options, weighed the risks of day versus night, and concluded that both safety and accuracy considerations militated in favor of daytime resupply flights in southern Nicaragua.

Contrary to Petitioners' assertion, the court of appeals did not specify exactly how low the plane was when it was hit. It was irrelevant to the issue of liability whether the aircraft was at 800 feet or 3,000 feet (instead of at 10,000 feet where there was little risk of being hit[6]) since all the testimony was that the operational conditions, such as the need to visually see the drop zone and the need for pinpoint accuracy which required low level flight, rather than any conduct of the defendants, created the risk of a missile hit. *See* Pet. at 0-2-15-16.

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[6] Witnesses testified that the standard procedure, which was used on the day of the attack, would be to fly in through the clouds at 10,000 to 14,000 feet (above the range of the missiles) and then descend to 8,000 feet before the final descent to 400 feet at the drop zone. The missiles were effective as high as 8,000 feet. [R. Hasenfus 22-421-186-189; Piowaty 36-435-2530-33].

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Dated: December 2, 1992

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

EUGENE HASENFUS, an individual and SALLY HASENFUS, an individual, *Plaintiffs,* vs. RICHARD SECORD, an individual, and SOUTHERN AIR TRANSPORT, INC., a Florida Corporation, *Defendants.*	Case No. 88-1841-CIV-ATKINS
KASANEE SAWYER, an individual, and KASANEE SAWYER, Administratrix of WALLACE B. SAWYER, Deceased, *Plaintiffs,* vs. RICHARD SECORD, an individual, and SOUTHERN AIR TRANSPORT, INC., a Florida Corporation, *Defendants.*	Case No. 88-1850-CIV-ATKINS

ORDER DENYING PLAINTIFFS' MOTION FOR A NEW TRIAL

THIS CAUSE is before the Court on Plaintiffs' Motion for a New Trial. After careful consideration of all the pleadings and the relevant law, it is

ORDERED AND ADJUDGED that Plaintiffs' Motion for a New Trial is hereby DENIED.

I.
INTRODUCTION

This case arose out of the covert attempt to supply arms to the so-called Contra forces in Nicaragua. The facts and general backdrop of the case are set forth in prior court orders, and the familiarity with those facts is presumed. *See* Order Granting in Part and Denying in Part Defendant Southern Air Transport's Motion to Dismiss (March 29, 1989) ("Order on Motion to Dismiss"), at 2-4; Order Denying Defendant Richard Secord's Motion to Dismiss Plaintiff's Amended Complaint (May 3, 1990) ("Order on Motion to Dismiss"), at 1-3; Order Granting in Part and Denying in Part Defendant Southern Air Transport's Motion for Summary Judgment (July 24, 1990) ("Order on Motions for Summary Judgment"), at 1-4; Order Granting in Part and Denying in Part Defendants' Motion for Directed Verdict (September 10, 1990) ("Order Granting In Part And Denying In Part Defendants' Motion for Directed Verdict"), at 2-4.

This case was tried to a jury during the latter part of August, 1990. At trial, the parties proceeded under two vicarious liability theories: joint venture and agency.[1] The Hasenfuses', through their Third Amended Complaint, sought damages from all the defendants based on the following theories: (1) breach of written and oral contract; (2) breach of intentional and/or negligent misrepresentation; and (3) conversion. Likewise, the Sawyers' Third Amended Complaint

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[1] This court's order file-stamped July 24, 1990 granted SAT's motion for summary judgment to the extent that plaintiffs were not permitted to impose liability against the defendants on the alter ego or the civil conspiracy theories.

charged the defendants with: (1) breach of contract; (2) negligence; (3) intentional and/or negligent misrepresentation; and (4) wrongful death based on the above counts.

At the close of all the evidence and after hearing arguments on the motion, this court granted in part and denied in part defendants' motion for directed verdict.[2] The motion for directed verdict was granted in regard to Hasenfuses' claim for conversion. As to the Sawyers' Third Amended Complaint, the motion for directed verdict was granted in regard to Sawyers' claim for negligence, intentional misrepresentation, negligent misrepresentation and the wrongful death claim which was based on the above causes of action. The jury found for plaintiffs on their vicarious liability theories of joint venture and agency, but ruled in favor of defendants on all other claims. A judgment and jury verdict were entered in favor of defendants. This motion for a new trial followed.

II.
DISCUSSION

A. *General Principles Applicable to Fed. R. Civ. P. 59*

The crux of the plaintiffs' post-trial motion is that this court erred in granting in part and denying in part defendants' motion for a directed verdict on the negligence and misrepresentation claims and further gave erroneous instructions and special verdicts which entitle them to a new trial. Before examining each allegation it would do well to delineate the overarching principles against which the allegations must be assessed.

New trials are granted to prevent miscarriages of justice or to correct manifest errors of law or fact. *See, e.g., Fund of*

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[2] The Court announced its determinations on the motion for directed verdict to all parties in open court on August 17, 1990, at the close of all the evidence. On September 10, 1990, the Court supplemented the record with a written order on the motion.

Funds, Ltd. v. Arthur Anderson & Co., 545 F. Supp. 1314, 1326 (S.D.N.Y. 1982) (prevent miscarriage of justice or erroneous verdict); *Adams v. James*, 526 F. Supp. 80, 86 (M.D. Ala. 1981) (correct manifest errors). New trials are not, however, intended to afford the defeated party a vehicle through which he or she may relitigate decided issues. *See Adams*, 526 F. Supp. at 86 (cannot relitigate old matters); *see also Fontenot v. Mesa Petroleum Co.*, 791 F.2d 1207, 1219 (5th Cir. 1986) (analogous motion to amend findings should not be used "to advance new theories, or to secure a rehearing on the merits").

In regard to jury verdicts, a trial court may grant a motion for a new trial if it believes that the verdict was contrary to the great weight of the evidence. *Rosenfield v Wellington Leisure Products, Inc.*, 827 F.2d 1493, 1497-98 (11th Cir. 1987) (citing *Williams v. City of Valdosta*, 689 F.2d 964, 973 (11th Cir. 1982)). Although this court may properly weigh the evidence supporting the verdict, *Rosenfield*, 827 F.2d at 1498 (citing *Rabun v. Kimberly-Clark Corp.*, 678 F.2d 1053, 1060 (11th Cir. 1982)), it must find the verdict was contrary to the great and not the greater weight of the evidence. *Rosenfield*, 827 F.2d at 1498 (citing *Williams*, 689 F.2d at 973)). This court must view the evidence favoring the verdict as well as that in favor of the moving party, but should not substitute its credibility determinations or inferences for those of the jury. *Rosenfield*, 827 F.2d at 1498 (citing *Williams*, 689 F.2d at 973-74 n.7). The court, therefore, reviews the plaintiffs' motion with these principles in mind.

B. *Application To Each Alleged Prejudicial Error*

Plaintiffs claim that this Court committed prejudicial error on various points decided below. We address each claim separately.

(1) Negligence

Plaintiffs first assert that this Court committed error in directing a verdict for defendants on issues of negligence.[3] Under Florida law, the elements of actionable negligence are:

> (1) a legal duty owed by defendants to plaintiff;
>
> (2) breach of the duty; and
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> (3) injury sustained as a proximate result of the breach.

Hensley v. U.S., 728 F. Supp. 716, 721 (S.D. Fla. 1989) (applying Florida law on negligence) (citations omitted). "To establish proximate cause under Florida law, plaintiffs must show that the defendant's alleged wrong caused the damage complained of." *Id.* at 722 (citations omitted). The sequence of events between the negligent act and the injury must be natural, direct and continuous that it can reasonably be said that but for the act the injury would not have occurred. *Id.* (citations omitted). Therefore, an essential element to proximate cause is causation in fact or the "but for" test. *Id.* (citing *Sardell v. Malanio*, 202 So.2d 746, 747 (Fla. 1967)).

In our previous order on the directed verdict motion, we reasoned that after viewing all the evidence presented in the case in the light most favorable to the plaintiffs, no reasonable

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[3] The only direct claim for Negligence was in Count II of Sawyer's Third Amended Complaint. By granting the motion to conform the evidence to the pleadings, the Court allowed the plaintiffs to proceed on other theories of negligence not asserted in the pleadings. However, the granting of this motion only affected the Hasenfuses' complaint to the extent that any of the claims in the Hasenfuses' Third Amended Complaint were based on factual underpinnings of negligence. At no time during the trial did the court allow the Hasenfuses' to add a separate claim of negligence to their Third Amended Complaint.

juror could find that but for the defendants' alleged negligence[4], the aircraft would not have been shot down. See Order dated September 10, 1990 Granting in Part and Denying in Part Defendants' Motion for Directed Verdict page 12-17. In other words, even assuming that plaintiffs had established negligence on the part of the defendants, they failed to establish that any such negligence was the proximate cause of the tragic airplane crash. *Hensley*, 728 F. Supp. at 723. We stand by this reasoning.

Plaintiffs' motion for a new trial does not directly address the proximate causation element; instead, plaintiffs reargue their various theories of negligence concentrating on the duty and breach elements. The undisputed facts show that the aircraft was hit by an unseen heat-seeking missile on October 5, 1986. The heat-seeking missile was drawn to the flames emitted from the aircraft's engines. The flames emitted from the aircraft were the same whether flying during the day or night. Nothing that the defendants, their agents or anyone acting in a joint venture with defendants did or failed to do caused or contributed to the crash of the aircraft. Thus, the motion for a new trial is denied as to the negligence issue; the Court properly directed a verdict on the negligence theory.

(2) Ultrahazardous Activity Doctrine

Plaintiffs claim that they presented sufficient evidence to warrant a jury determination that the Contra supply mission was an ultrahazardous activity. On March 28, 1989, this Court granted the Defendant's Motion to Dismiss as it related to plaintiffs claim for strict liability in tort based on an ultrahazardous activity. Having reviewed the facts presented at trial and the applicable Florida law, we stand by our earlier ruling. The doctrine of strict liability for ultrahazardous activity has no application to the present case and does not permit

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[4] Negligence here includes all theories that plaintiff conformed to the evidence. Plaintiff raised new theories of negligence at trial which were not directly pleaded in plaintiff Sawyer's Third Amended Complaint.

an employee to hold strictly liable his employer for personal injuries sustained during the course of an employment relationship. See Order Granting in Part and Denying in Part Defendant Southern Air Transport's Motion to Dismiss dated March 29, 1989 pages 7-9.

(3) Misrepresentation

The court's order dated September 10, 1990 only directed a verdict on plaintiff Sawyer's claims of misrepresentation, not Hasenfus, claim for misrepresentation. Plaintiff asserts that a new trial on all misrepresentation claims must be granted for all plaintiffs. Sawyer's claims for misrepresentation did not withstand the directed verdict motion at the close of all the evidence and do not now warrant our granting of a new trial. There was no evidence of any knowingly or negligently false statements of material facts upon which Wallace B. Sawyer justifiably relied and which caused his death or other damages. *Royal Typewriter Co. v. Xerographic Supplies Corp.*, 719 F.2d 1092, 1103 (11th Cir. 1983) (applying Florida law on misrepresentation). Surely to allow these claims to go forward without any proof of reliance whatsoever would amount to reversible error; it was not prejudicial error to direct a verdict in regard to Sawyer's claims or misrepresentation.

(4) Special Verdict Forms and the Jury Instructions

Plaintiffs take issue with the special verdict forms and instructions submitted to the jury claiming prejudicial error on various points. Before addressing the alleged errors, it would do well to outline some additional principles in regard to challenges to the propriety of special verdict forms and jury instructions.

"The test employed in determining whether a conflict in the verdict can be reconciled is 'whether the answers may fairly be said to represent a logical and probable decision on the relevant issues submitted . . .' " *Burger King Corp. v. Mason*, 710 F.2d 1480, 1489 (11th Cir. 1983), *cert. denied*,

465 U.S. 1102 (1984) (quoting *Griffin v. Matherne*, 471 F.2d 911, 915 (5th Cir. 1973)). "A special verdict which does not resolve the essential facts, or does so in an inexplicable fashion, will not support a judgment." *Id.* at 1489 (citations omitted).

"The purpose of the jury instructions 'is to give the jury a clear and concise statement of the law applicable to the facts of this case.' " *Pesaplastic, C.A. v. Cincinnati Milacron Co.*, 750 F.2d 1516, 1525 (11th Cir. 1985) (quoting *Hanover Fire Insurance Co. v. Sides*, 320 F.2d 437, 444 (5th Cir. 1963)). The charges, considered as a whole, should sufficiently instruct the jury so that the jurors understand the issues involved and are not misled. *Id.* at 1525 (citing *Frosty Land Foods International, Inc. v. Refrigerated Transport Co.*, 613 F.2d 1344, 1348 (5th Cir. 1981)). The law is also well-settled that a "trial court's refusal to give a requested instruction is not error where the substance of that proposed instruction was covered by another instruction which was given." *Id.* (citations omitted).

Plaintiffs first take issue with the Sawyer special verdict form questions two and three which stated as follows:

AGENCY

2. Do you find that William (Bill) Cooper or Corporate Air Services, Ltd., was the agent of the defendants, SAT or Richard Secord, at the time Wallace B. Sawyer signed the written Agreement?

(see the written instruction [sic] on agency)

* * * * *

CLAIM FOR BREACH OF CONTRACT

3. Was there a contract between Wallace B. Sawyer and defendants, Richard Secord or SAT for services to be rendered by Sawyer and benefits to be paid thereunder?

The jury answered question two in the affirmative as to both defendants SAT and Richard Secord. This question directly related to one of plaintiffs' theories of vicarious liability: the agency theory. The jury correctly followed the instructions on the Sawyer special verdict form and went on to answer question three. As to question three, the jury answered in the negative.

Plaintiffs main objection to questions two and three is that when the jury considered question three it improperly focused its attention on the Independent Contractor Agreement Sawyer signed because of the reference to "written Agreement" in question two. They object to question two's reference to "written Agreement" and argue that the purported written Agreement became the point of reference for the jury to evaluate Sawyer's claim for death benefits. Plaintiffs also assert that question three is improper in that it does not mention the agency theory.

The written Independent Contractor Agreement signed only by Wallace B. Sawyer was admitted into evidence pursuant to Federal Rule of Evidence 901. There were no objections to the introduction of the Sawyer written Agreement. The jury's answering of yes as to both defendants for question two, showed only that the jury found that an agency relationship existed at the time that Sawyer signed the written Agreement. Nothing about question three suggested that the "contract" referred to could only be the written Agreement referred to in question two. The jury instructions further support this conclusion. The jury instructions generally refer to a "contract" or "agreement", not to a specific written Agreement. The jury instruction on breach of contract are very clear that a contract can be both oral and written and also that an express provision of a contract can be specifically agreed to by the parties, either orally or in writing. See the Court's Instruction to the Jury pages seventeen through nineteen. Indeed Plaintiffs' counsels' arguments to the jury expressly argued to the jury the existence of oral terms of an agreement to provide death benefits. The use of the term "written Agreement" in Sawyer's Special Verdict Form question two did not constitute prejudicial error.

Plaintiffs next argument is that the failure of question three to refer to an agent of the joint venture is prejudicial error. The courts instruction of Sawyer's claim at page eleven makes clear that any contract, entered into by William Cooper or Corporate Air Services, Ltd. was also between Sawyer and SAT or Secord. The Court made it clear that the jury was to consider the instructions taken as a whole. The Sawyer special verdict form when read in conjunction with the language of the instructions, including the instructions on agency and contract, coupled with all the closing arguments by plaintiffs' counsels', negates any prejudicial error in this regard. The answers to questions two and three on the Sawyer special verdict form fairly represent a logical and probable decision on the relevant issues submitted. *See e.g. Burger King Corp.*, 710 F.2d at 1489. The jury found that an agency relationship existed and went on to consider the existence of a contract. In light of the extensive instructions on all the theories which were correct statements of the law and of plaintiffs claims, it can be fairly said that the essential facts were resolved and there were not inconsistencies or ambiguities. The jury instructions gave the jury a clear and concise statement of the law applicable to the facts of this case and the charges, considered as a whole, sufficiently instructed the jury to so that the jurors understand the issues involved and were not mislead.

Despite the jury's finding in favor of plaintiffs on the agency theory, plaintiffs' motion for a new trial asserts prejudicial error in regard to the court's specific instructions on agency. Specifically, plaintiffs contend that the court's instructions on agency required the jury to find that an agent had to be an "employee" of SAT or Secord to be an agent. Plaintiffs also argue that the jury was precluded from considering the liability of SAT and Secord for the acts of their agents Schofield and Abrams.

The Court's instructions on agency were as follows:

> The second theory of liability upon which the plaintiffs seek to hold the defendants liable is called

the agency theory. To find that the plaintiffs may proceed on this theory, you must determine whether William Cooper or anyone acting for Corporate Air Services, Ltd. was an agent of the defendants and acting within the course and scope of their employment at the time and place of the conduct complained of. An agent is a person who is employed to act for another, and whose actions are controlled by his employer or are subject to his employer's right of control. An employer is responsible for the conduct of his agent if such conduct occurs while the agent is performing services which he was employed to perform or while the agent is acting at least in part because of a desire to serve his employer and is doing something that is reasonably incidental to his employment or something the doing of which was reasonably foreseeable and reasonably to be expected of persons similarly employed.

An agency relationship can also be imposed under apparent authority. You must determine whether William Cooper and anyone acting for Corporate Air Services, Ltd. was an agent of the defendants and acting within the scope of their apparent authority at the time and place of the conduct complained of. William Cooper and anyone acting for Corporate Air Services, Ltd. was an apparent agent if the defendants by their words or conduct caused or allowed Eugene Hasenfus, Sally Hasenfus and/or Wallace B. Sawyer to believe that they were agents of and had authority to act for the defendants and if Eugene Hasenfus, Sally Hasenfus and/or Wallace B. Sawyer justifiably relied upon that belief in dealing with the above named as the agent of the defendants. A person or corporation is responsible for the conduct of his apparent agent occurring while the apparent agent is acting within the scope of his apparent authority.

See Court's Instructions to the Jury pages fourteen through fifteen.

The instructions do not refer to the term "employee." Nor do the instructions relate to any employer-employee relationships. The term "employer" is commonplace in discussions of the relationship of non-servant agents or independent contractors to their principal. *See e.g.*, Keaton, *Prosser and Keaton on Torts*, §§ 70, 71 at 508-510 (5th Ed. 1984); Reuschlein & Gregory, *Agency and Partnership*, § 3 at 8 (1979). Neither the jury instructions nor the special verdict forms required the jury to find that an employee-employer relationship existed. In fact, the jury instructions submitted by plaintiffs included the term "employed" and "employer." Under these circumstances, the use of the words employed, employer or employment in the instructions, if error, was harmless. *Pate v. Seaboard R.R. Inc.*, 819 F.2d 1074 (11th Cir. 1987). The jury was properly guided in its deliberations and a new trial is not justified. *See Houston v. Herring*, 562 F.2d 347, 348-49 (5th Cir. 1977).

Plaintiffs also claim that the agency instructions precluded a finding by the jury that SAT and Secord were liable for the acts of Schofield and Abrams. Plaintiffs contend that the jury should have been instructed more specifically as to plaintiffs' theory that both Schofield and Abrams were allegedly agents of the joint venture or of the defendants. Schofield and Abrams were employed by the State Department and are alleged to have been connected with the covert operation. Notwithstanding defendants hearsay objections to the testimony of Sally Hasenfus regarding the alleged statements of Schofield and Abrams, the plaintiffs were permitted to introduce all the evidence they had on this issue. There simply was no competent evidence from which the jury could reasonably infer that the agency relationships necessary to link the alleged statements by these state agents to defendants SAT and Secord. A litigant is entitled to have the jury instructed as to his claims and theories if they are legally correct and supported by the evidence. The agency instructions allowed the jury to consider the actions of Schofield and Abrams by

allowing the jury to consider whether "William Cooper or anyone acting for Corporate Air Services, Ltd. was an agent of the defendants." The instructions allowed the jury to consider the actions of Schofield and Abrams to the extent that the evidence permitted. If the jury accepted plaintiffs' claim that Corporate Air Services, Ltd. was a sham and only a front for the defendants, the jury could have found that Schofield and Abrams were acting for Corporate Air Services, Ltd. and thereby acting as agents for the defendants and the joint venture. There was no prejudicial error in regard to the court's instructions on agency. Finally, if any error occurred at all it was surely harmless.

(5) Parol Evidence

Plaintiffs also contend that the court erred in refusing to admit parol evidence that the Hasenfus and Sawyer written contracts were a sham and the phoney employment agreements were not binding contracts. This argument is misplaced; the court did not so limit the arguments precluding the plaintiffs from making the assertion that the written contracts were a sham. To the contrary, the court allowed plaintiffs to present all their evidence in this area. Plaintiffs were allowed despite various hearsay objections on the part of the defendants, to question the various witnesses about the written agreements. Although Piowaty and others testified at trial or through deposition testimony that they were not concerned about the terms of the written employment agreement beyond the fact that they understood that they were independent contractors, none of the witnesses testified that the written agreements were shams or not binding. Hasenfus himself testified that he signed the Independent Contractor Agreement which was introduced into evidence and conceded that he was in fact paid according to the written terms of the agreement.

In general it was evident that many of the witnesses admitted to signing the written agreements, but thought the contracts did not contain all the terms of the employment agreement. It became obvious early on in the trial that oral

modifications to an existing agreement or separate oral agreements were very important to the case. Therefore, the court was mindful of this during the trial and was sure to include the appropriate jury instructions. See pages seventeen and eighteen of the Court's Instructions to the Jury. The court never limited the plaintiffs in their arguments of such oral agreements or modifications; no error occurred.

(6) Obligations to pay after the October 5, 1986

Hasenfus identifed the Independent Contractor Agreement and admitted to signing the agreement acknowledging the terms of employment, salary and living expenses stated therein. Hasenfus acknowledged the type of services he was to perform in accordance with the agreement and admitted his inability to perform the services after the crash on October 5, 1986. Plaintiffs had no evidence of any oral agreement or modifications of any oral or written agreement which inferred that Hasenfus' pay was to continue if he was unable to perform as a kicker or if he was captured. Hasenfus himself did not testify to such an oral modification. It would have been error to allow plaintiffs to argue this obligation to pay after the crash occurred since there was absolutely no evidence from which a reasonable juror could find such obligation to pay. The court's decision to not hold defendants liable for any terms of the agreement after the crash was not prejudicial error.

DONE AND ORDERED at Miami, Florida, this 7th day of January, 1991.

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SENIOR UNITED STATES DISTRICT JUDGE

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